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ABSTRACT

While schools at one time appeared to be immune from criminal liability and courtroom litigation, cases involving virtually every aspect of education have been, or are currently, in court at some level. This monograph is designed to help school lawyers, trial lawyers who represent victims of campus crimes, and educators and administrators engaged in planning risk and liability prevention programs and campus crime prevention programs. Issues discussed include: (1) school crime, the victims' rights movement, and the right to safe schools; (2) victims' rights litigation; (3) classifications of litigation involving victims as victims, victims against perpetrators, and victims against third parties; (4) schools as victims rights litigation defendants and the question of school immunity; (5) claims for failure to protect against or prevent non-student crime or violence; (6) claims for failure to protect against or prevent student crime or violence, including the possibility of negligence; and (7) the various responsibilities of schools, students, parents, and the community to provide safe schools. Primary court citations and state and federal code provisions involving victims' rights and safe schools are indexed. (PPB)

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SCHOOL CRIME & VIOLENCE VICTIMS' RIGHTS

JAMES A. RAPP FRANK CARRINGTON GEORGE NICHOLSON

NATIONAL SCHOOL SAFETY CENTER

School Crime and Violence: Victims' Rights
By James A. Rapp, Frank Carrington and George Nicholson

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National School Safety Center
Pepperdine University's National School Safety Center is a partnership of the U.S. Department of Justice and U.S. Department of Education. NSSC's goal is to bring a national focus to school safety. This includes preventing campus crime and violence, improving discipline, increasing attendance and preventing drug traffic and abuse. NSSC communication and technical assistance activities help coalesce public, private and academic resources to ensure all our schools are safe, secure and peaceful places of learning.

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Foreword

When Massachusetts created America's first state board of education in 1837, that board selected a lawyer, Horace Mann, to serve as this Nation's first state superintendent of schools, a post he held with distinction for 12 years. Many outstanding lawyers and judges, although usually in their lay capacities, have since been actively involved with public schools.

Formal legal intervention in school matters was a rarity until the 1950's and 1960's. Since then, lawyers and judges have become ever more actively involved with schools; frequently in a professional role, often adversary in nature. This change is noted in many landmark United States Supreme Court decisions, among them *Brown v. Board of Education* and *Tinker v. Des Moines Independent Community School District.*

This trend is especially evident now that our country has entered an era of expanding liability and exploding litigation. The law has become the vehicle for attempting to settle countless conflicts which might formerly have been resolved by other means in the local community.

It is clear America's schools, and the people associated with them, are not immune from burgeoning liability and litigation. Cases involving virtually every aspect of education have been, or are currently, in court at some level.

Without debating the merits of injecting courtrooms into classrooms, it is safe to say many educators are not familiar with the magnitude, import or specifics of the amorphous, and often *ad hoc,* phenomenon. Parents and students are similarly handicapped. This lack of information and understanding can only breed more conflict and litigation.

It is futile to criticize the courts or lawyers for the tendencies of a litigious society. It also serves no purpose to criticize educators, parents and students for their unfamiliarity with the legal process. Schools, and people within them, must deal with the legal here and now. The key question here, is, how can the legal community help them to do that?

This volume, *School Crime and Violence: Victims' Rights,* will be

of help to trial lawyers who represent victims of campus crimes. It will also be of help to school lawyers in their efforts to prevent such cases from arising in the first place. This can be achieved by serving as a useful tool for advice to educators and school administrators in risk and liability prevention, and in implementing campus crime prevention programs.

In addition, *School Crime and Violence: Victims' Rights* will serve as an incentive for the implementation and expansion of multifaceted preventive law programs in all our Nation's schools.

The necessity for such expansive anticipatory action can be taken from a popular television advertisement, "You can pay me now or you can pay me later." That is, we can pay to anticipate and prevent campus crime and violence, or in the absence of foresight and action, we can pay for the damage, destruction and, indeed, the human suffering which will inevitably follow. This book will demonstrate to any lay or professional reader that the fiscal and human costs of failure are too high.

Justice Stanley Mosk
Supreme Court
State of California

Justice Melvyn Tanenbaum
Supreme Court
State of New York

Introduction

Crime victims have long been forgotten parties in the administration of justice. In the mid-1970's that all began to change. It was then the "Victims' Movement" began in earnest.

Countless victim-oriented reforms have since swept through courthouses and statehouses until, in 1981, they reached all the way into the White House when President Ronald Reagan proclaimed America's first Victims' Rights Week. Ironically, he had become the Nation's most visible crime victim, having just suffered a grievous gunshot wound at the hand of an attempted assassin.

While innocent citizens, even presidents, may be victimized by crime anywhere, there are some places where people do deserve special status. Schools are just such special places and their students and staff require special attention and special protection.

In 1982, California voters adopted Proposition 8, the Victims Bill of Rights. It included an amendment to the California Constitution creating an inalienable right to safe public schools for all students and staff. While there is no similar constitutional mandate yet included in the law of any other State, this unique, new right holds the promise and potential of ushering in a new era of responsible school management - one which recognizes and responds to the needs and liberties of innocent students and staff. This reform is long overdue.

Although similar constitutional mandates are lacking in other States, virtually all States provide a potential remedy to innocent students and staff through civil tort suits against school officials who fail to warn of, or protect against, criminal dangers which are known or should have been known. Negligence suits for improper hiring or retention of dangerous school employees are yet another potential remedy for campus crime victims.

This exciting new book, *School Crime and Violence: Victims' Rights*, is a comprehensive guide for protecting school crime victims. The book is authored by three prominent lawyers, James A. Rapp of the Illinois Bar, Frank Carrington of the Virginia Bar, and George Nicholson of the California Bar, all of whom possess established, national credentials as crime victims' advocates.

The book provides the Nation's first concise, central source for

quickly accessing and utilizing new legal authorities pertinent to the inalienable right to safe schools, and tort principles relating to the rights of campus crime victims. Thus, trial lawyers may use the book to enhance potential success in litigation.

The book also provides the means to implement an even more elemental right - that of being free from the risk of criminal victimization altogether. Thus, school officials may use the book to identify risks and responsibilities and respond in a variety of ways to minimize, if not totally eliminate, the potential for litigation.

Clearly, students and staff who suffer as a result of culpable misconduct of school officials should have a remedy. At the same time, everyone should work with school officials to help them anticipate, deter and prevent campus crime. This book serves both purposes well.

The book serves one additional purpose. It can be used as a supplemental text in courses such as education law, torts, family law, workers' compensation, juvenile justice, and constitutional law, among others.

School Crime and Violence: Victims' Rights will thus help future professionals, as well as in-service professionals, to recognize and assimilate a change in the law which, heretofore, has largely gone unheralded. United States Supreme Court Chief Justice Warren Burger recently described that change: "The serious challenge of restoring a safe school environment has begun to reshape the law." This book is an excellent chronical of the legal authorities which largely underpin the Chief Justice's cogent observation.

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Acknowledgments

The National School Safety Center and Pepperdine University gratefully acknowledge the significant contributions of authors James A. Rapp, Frank Carrington and George Nicholson. Their qualifications and experience are summarized below:

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Mr. Rapp is the editor-in-chief and principal author of *Education Law*, a comprehensive treatise on legal issues in education published by Matthew Bender & Company, Incorporated. In addition, he co-authored *Illinois School Law*, *Illinois Public Community College Act: Tenure Policies and Procedures*, and *Attorney's Guide to Illinois Real Estate Taxation*, all published by the Illinois Institute for Continuing Legal Education, and *Illinois Legal Systems: Domestic Relations*, published by Matthew Bender & Company, Incorporated. He also serves as editorial consultant for *Illinois Legal Systems: Corporations*, published by Matthew Bender & Company, Incorporated. He has written other articles and publications, and spoken at numerous conventions, seminars and workshops.

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Mr. Carrington has written extensively in the area of victims' rights, including the landmark publication *The Victims*, published by Arlington House, which focused concern toward the victims of crime. He has written *Evidence Law for the Police*, published by Chilton, and co-authored *The Defenseless Society*, published by Arlington House. He also has written many law review and other articles, and spoken at numerous conventions, seminars and workshops.

Actively involved in victims' rights matters, Mr. Carrington was a member of President Reagan's Task Force on Victims of Crime, Attorney General Meese's Task Force on Violent Crime, and a chairman of the American Bar Association's Victims Committee.

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George Nicholson, an attorney in Sacramento, California, is the former director and chief counsel of the National School Safety Center, Sacramento, California. He is admitted to practice law in the State of California, the federal courts in the Eastern District of California, the Ninth U.S. Circuit Court of Appeals, and the United States Supreme Court, among other courts. He received a B.A. degree from California State University at Hayward and a J.D. degree from Hastings College of Law.

Mr. Nicholson served as an adjunct professor of education at the Graduate School of Education and Psychology, Pepperdine University. He was senior assistant attorney general for California and in that capacity authored California's constitutional right to safe schools. Previously, he was executive director of the California District Attorneys Association, senior trial deputy district attorney with Alameda County and a legal and education advisor to Governor George Deukmejian. In addition, he has written numerous articles and publications on the right to safe schools and related topics, as well as spoken at various conventions, seminars and workshops.

Mr. Nicholson serves as a board member of the Victims Assistance Legal Organization, Inc. (VALOR); advisory committee member of the Victims of Crime Resource Center, McGeorge School of Law, University of the Pacific; member of the American Bar Association's Victims Committee; member of the President's Advisory Committee on the Victims of Crime; and member of the National Association of College and University Attorneys.

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Chapter I

School Crime and Violence Victims

When Mark Twain's Tom Sawyer and his classmates believed themselves oppressed by the demands of their teacher, Tom sought retribution by lowering a cat from directly above the teacher during end-of-term festivities. The desperate animal clawed at the first thing she came into contact with which, as planned, was the teacher's wig. The cat, with her trophy still in her possession, was snatched up in an instant. And how the light did blaze abroad from the vain teacher's bald pate - for one boy had secretly *gilded* it! That broke up the meeting. The boys were avenged.[1]

Tom's prank was a risky sort of thing to do; the cat, thrashing about in the air, *could* have injured its target. For Mark Twain and readers of *The Adventures of Tom Sawyer*, it was a highly humorous episode of boyish devilment.

Students probably have been raising Cain in schools[2] since the concept of structured classroom education first dawned. Maintaining order in the classroom has never been easy, but, as recognized by the United States Supreme Court, "in recent years, school disorder has often taken particularly ugly forms; drug use and violent crime in the schools have become major social problems."[3] In many localities, especially inner city urban campuses, we are not confronted simply by mischievously inclined students, but by hard core school-aged youth inclined to commit serious crimes against the persons and property of fellow students, teachers and others on or about the school campus.

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1. M. Twain, *The Adventures of Tom Sawyer*, chapter XXI.
2. Throughout this book, the terms "school" and "schools" are frequently used. This book covers victims rights at all educational levels - primary, secondary and post-secondary. Therefore, "school" and "schools" should be considered in their broadest sense.
3. New Jersey v. T.L.O., 469 U.S. ___, 105 S. Ct. 733, 742, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985).

Scope of Problem

Despite researchers' focus on academic standards and improvements, "The Gallup Poll on the Public's Attitudes Toward the Public Schools" identifies discipline as the number one public concern in all but one year since 1969.[4] The gravity of this concern was documented by the National Institute of Education (NIE) in 1978 which completed and published *Violent Schools - Safe Schools: The Safe School Study Report to the Congress.*[5] Among the findings of the NIE Study were the following:

* Approximately 25 percent of the Nations' schools are vandalized each month, costing schools more than $200 million annually.
* Burglaries occur five times more often in schools than businesses, and average $150 for each theft of school equipment, supplies, or other property.
* Break-ins, bomb threats or incidents, trespass cases, extortions, and thefts of school property were the *least* likely offenses to be reported, although one of every 100 schools experienced a bomb-related offense in a typical month.
* Each month nearly 282,000 students are attacked in schools, with younger students being the most likely victims.
* Forty percent of the robberies and 36 percent of the assaults on teenagers occur in schools, with statistics even higher for youths 12 to 15 years of age.
* Each month, more than 2.4 million secondary school students are victims of theft, many involving the use of force, weapons or threats.
* Each month, approximately 130,000 of the 1.1 million secondary teachers have something of value stolen.
* Each month, approximately 5,200 teachers report being physically attacked, and are five times as likely as students to be seriously injured in those attacks.[6]

These national statistics have been reflected in local studies as well.

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4. National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* 5 (1984).
5. NIE, U.S. Dept. of Health, Education and Welfare, *Violent Schools - Safe Schools: The Safe School Study Report to the Congress* (1978).
6. These statistics are also summarized in National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* 11-12 (1984), and the Memorandum of the Cabinet Council on Human Resources Working Group on School Violence/Discipline entitled: *Disorder in our Public Schools. See also* National Center for Education Statistics, *Discipline, Order and Student Behavior in American High Schools* (1981).

A study of Boston's public schools showed that:

* Three out of ten students admitted carrying weapons to school.
* Half of the teachers and almost 40 percent of the students were victims of school robbery, assault, or larceny.
* Nearly four in ten students often feared for their safety in school or reported avoiding corridors and rest rooms.[7]

Perpetrator's Rights

The problem of school crime and violence is acute and probably understated.[8] As the causes and solutions to the problem are debated,[9] the rights of students who engage in crime and violence are pitted against the rights of their victims.

In the broader area of criminals' rights versus victims' rights, spokespersons for the rights of accused and convicted criminals argue that: 1) victims do not have any constitutional rights;[10] 2) it is better to have a few people murdered than to tamper with the civil liberties of criminals;[11] and, 3) victims of crime should not be allowed to

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7. Boston Safe Schools Commission, *Making Our Schools Safer for Learning* (1983).
   Other local studies have been conducted. *See, e.g.*, E. Tromanhauser, T. Corcoran and A. Lollino, *The Chicago Safe School Study* (Center for Urban Education, Chicago Board of Education, 1981); Hawaii Crime Commission, *Violence and Vandalism in the Public Schools of Hawaii* (1980); J. Parker, L. Winfree, W. Archambeault and S. Flemming, *The Nature and Extent of Delinquency Activity in Louisiana Public Schools* (Louisiana State University, 1982); J. Weis and J. Hawkins, *Prevention of Delinquency* (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention 1981).
8. The NIE Study probably understated the actual incidence of school violence at the time the study was conducted because approximately two-thirds of personal thefts and robberies and almost three-fourths of property damages go unreported to the police. *See* J. Toby, "Violence in School," in *Crime and Justice: An Annual Review of Research* (Institute for Criminological Research, Rutgers University, 1984).
9. A discussion of the causes and solutions to school crime and violence is beyond the scope of this book. Selected sources regarding these topics are noted in Chapter Nine *infra*.
10. *See, e.g.*, B. Palmer, *The Rights of Victims: A Differing View*, Washington Star News, July 8, 1975, at 1, col. 1. In an interview with Alan Goldstein of the Maryland Civil Liberties Union, the following comments were made:
    B. Palmer: You have been outspoken in your opposition to the movement to strengthen the rights of victims. You have stated that "victims don't have rights." Could you explain this?
    A. Goldstein: Well, I don't mean that victims don't have rights in a general sense. But what they really are in the criminal justice process, are witnesses for the procecution, and in that sense they do not have constitutional rights which are guaranteed to the defendant.
11. This was the position of Professor Vern Countryman of Harvard Univesity Law School. In a conference sponsored by the Committee for Public Justice at Princeton University in 1971, Professor Countryman and Frank Carrington, one of the authors of this book, engaged in the following colloquy which regarded the right of the FBI to use infiltration techniques to prevent or solve bombings, specifically a bombing by the Ku Klux Klan of several school buses in Pontiac, Michigan:
    V. Countryman: Well, my judgment would be that if the only way to detect that bombing is to have the FBI infiltrate political organizations, I would rather the bombing go undetected.
    F. Carrington: No matter whether somebody was killed?
    V. Countryman: Yes. Yes, there are worse things than having people killed. When you have got the entire population intimidated, that may be worse. We put some limits on law

describe the impact of the crime on their lives when the perpetrator is sentenced because the impact of crime is not relevant to the criminal justice system.[12] By analogy, the rationale that civil libertarians espouse on behalf of criminals in general is carried over into the area of school discipline in the form of "student rights".

In the landmark case of *Tinker v. Des Moines Independent Community School District*,[13] the United States Supreme Court recognized students do not shed their constitutional rights at the schoolhouse gate. Accordingly, students have been held to enjoy various substantive rights such as those afforded by the First Amendment to the United States Constitution, including the right to engage in symbolic speech and political expression by wearing armbands to protest the Vietnam War.[14]

In the area of student crime and violence, the most significant rights afforded perpetrators are the prohibition against unreasonable searches and seizures and the entitlement to procedural due process.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. By virtue of the Fourteenth Amendment, this restriction applies with equal force to the States.[15] In the case of *New Jersey v. T.L.O.*,[16] the United States Supreme Court held that students in public schools also are protected against unreasonable searches and seizures. Schools must thus conform to

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enforcement in the interests of preserving a free and open society or at least we try to, and every time we do that - things like the privilege against self-incrimination, things like the Fourth Amendment - every time we do that, that involves a judgment that even though some crimes and some crimes involving the loss of life will go undetected, it is better in the long run to have a society where there is some protection from police surveillance.

F. Carrington: I'm not really that sure that the family of Robert Fassnacht, who was blown up at Wisconsin, or the families of the kids that were killed in the Birmingham church bombing would agree with that.

F. Countryman: I'm sure that the families of the victims would not agree in any of the instances that I've mentioned but I don't believe that most of us would say that for that reason we should repeal the Fourth and Fifth Amendments.

12. *See* D. Keisel, *Crime and Punishment, Victim Rights Movement Presses Courts, Legislatures*, 70 A.B.A. J. 25, 26 (January, 1984):

> Although the ACLU has taken no official position on victim impact statements, [Ira] Glasser [Executive Director of the ACLU] is concerned about their use. He fears they will generate inconsistent sentencing, and he is " . . . not sure the feelings of the victims are relevant" to the sentencing process.

Although not necessarily reflecting the policy of the American Civil Liberties Union, the authors of its handbook regarding victims' rights recognizes that crime victims deserve certain rights and that "these rights do not conflict with the concerns of the accused persons, prisoners, and free speech." J. Stark and H. Goldstein, *ACLU Handbook, The Rights of Crime Victims* 8 (1985). Victim impact statements are now commonly required in both Federal and State courts. *Id.* at 79, 81-82.

13. 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).
14. *See generally* J. Rapp, *Education Law* § 9.02 (Matthew Bender & Company, Incorporated).
15. *See* Elkins v. United States, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).
16. 469 U.S.___, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985).

the restrictions of the Fourth Amendment in its efforts to preserve order. The Supreme Court nevertheless recognized a certain degree of flexibility is required in school disciplinary procedures.

Rejecting the more stringent criminal law test of probable cause as a prerequisite to school searches and the necessity of a warrant, the Supreme Court held that a search will be reasonable if: 1) there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school, that is, the search was justified in its inception; and, 2) the search as actually conducted was reasonably related in scope to the circumstances which justified the search in the first place.[17]

In the case of *Dixon v. Alabama State Board of Education*,[18] the Fifth Circuit Court of Appeals held that students have a sufficient interest in remaining as students in good standing at a public institution of higher learning to require notice and the opportunity for a hearing before they could be expelled for misconduct. Subsequently, in *Goss v. Lopez*,[19] the United States Supreme Court similarly extended minimal due process protections to all students being suspended from a public elementary or secondary school even for as little as up to ten days.[20]

Under due process requirements, a student facing a suspension of ten days or less must be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the school authorities have and an opportunity to present his side of the story.[21] Rudimentary due process does not require that a student be afforded the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Instead, it requires only that the school authority do what a fair-minded person would impose upon himself in order to avoid unfair treatment.[22]

Where longer suspensions, expulsions or other substantial disciplinary actions are involved, more formal due process procedures are required. While the requirements of due process may vary under particular circumstances, they usually require the student be given:

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17. *Id.* 105 S. Ct. at 744-45. *See generally* J. Rapp, *Education Law* § 9.04 (Matthew Bender & Company, Incorporated).
18. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961).
19. 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).
20. J. Rapp, *Education Law* § 9.05[1][a] (Matthew Bender & Company, Incorporated).
21. *Id.* at § 9.05[2][b].
22. *Id.*

1) written notice of the charges against him; 2) the names of the witnesses against him and an oral or written report of the facts to which each witness will testify and, perhaps, the opportunity to cross-examine them; 3) the opportunity to present evidence; 4) a reasonable opportunity to prepare for the hearing; and, 5) the right to be represented by counsel.[23]

Although crime and violence in some schools have reached epidemic proportions and the public overwhelmingly wants something constructive done about it, there is little question that students engaging in crime and violence should enjoy rights constitutionally guaranteed to them. However, school officials have often given in to nearly every legal hurdle which student advocates have thrown before them whether or not actually required. In an effort to avoid litigation, school officials have often believed themselves to be stymied from maintaining a safe school environment.[24] School officials have acquiesced to this posture assuming that by placing emphasis on student rights, desirable student behavior would necessarily follow. Many have learned the hard way that law and order are not necessarily partners.

The often-overlooked plight of the victims of school-related crime and violence has become the common and cooperative concern of many school boards, educators, judges, lawyers and law enforcers.[25] It is being recognized that students, school officials and third parties are no less victims because they happen to be victimized on a school campus. Our purpose is to further encourage this cooperation by discussing the developing right to safe schools and the consequences which stem from failing to assure a safe school environment.

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23. *Id.* at § 9.05[3][b].
24. *See* National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* 15-16 (1984).
25. Instrumental in this cooperation has been the National School Safety Center. The Center promotes a continued exchange of information related to school safety and delinquency prevention.

Chapter II

Victims Respond: The Right to Safe Schools

No matter how excellent teachers or the material to be taught, learning is hampered when teachers are forced to teach, and students are forced to learn, in an atmosphere of fear of crime and violence. The effectiveness of the learning process varies in direct proportion to the quality of the learning environment.[1]

Many of the reports on educational reform - while agreeing on the need for curricula changes to develop "higher order thinking skills" and increased expectations and standards for graduation - insist that little reform can occur unless schools become safer.[2] Creating a safe and orderly environment is a prerequisite to any meaningful school improvement.[3]

Not only does a school's environment affect learning, but more than any other setting it influences how students - especially high school students - conform to society. Schools' internal life influences how all students behave, often more powerfully than the home or community. It is unlikely that a student immersed in a school environment of delinquency will form a more responsible view of society at large.[4]

Despite the acknowledged need for a safe and orderly school environment, public entities charged with providing for the safety of school children traditionally have failed to assign a sufficiently high

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1. In National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* at 3 (1984), the following concrete example is provided:

> Four years ago, George Washington high school in the Watts neighborhood of Los Angeles was rife with gangs and drugs and had one of the lowest academic standings in the country. Then came a new principal who demanded discipline. The absentee rate dropped from 32 percent to 6 percent, and last year 80 percent of the graduating seniors went to college.

2. M. Rutter, B. Maughan, P. Mortimore, J. Ouston and A. Smith, *Fifteen Thousand Hours: Secondary Schools and Their Affects on Children* (Harvard University Press, 1979). *See also* National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* (1984).
3. *Id.*
4. *Id.*

priority to the problem.[5] Further, no one entity has been charged with coordinating the patchwork of responsibility for the problem.[6]

Reshaping the Law

Responding to school crime and violence, victims have turned to the American legal system. Justice Lewis Powell best articulated the proper perspective with which the law should address cases involving school crime and violence:

> Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has an obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.[7]

Our legal system is now turning its attention to the plight of school crime and violence victims. And, as recognized by Chief Justice Warren E. Burger:

> The true genius of the American legal system - indeed of our entire system of government - is its evolutionary capacity to meet new problems. Legal institutions change as they respond to new challenges. The serious challenge of restoring a safe school environment has begun to reshape the law.[8]

Education law is being reshaped to assure a right to safe schools.[9]

California Constitutional Right to Safe Schools

In a dramatic effort coalesce attention to the problems of crime and violence in schools and seek substantive safeguards for school children, George Deukmejian, then California Attorney General, filed in 1980, a lawsuit to restore safety[10] in the Los Angeles Unified

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5. G. Deukmejian, *A Lawsuit to Restore Safety in the Schools* 2 (Crime Prevention Center of the Office of the California Attorney General, 1980).
6. *Id.* at 3.
7. New Jersey v. T.L.O., 469 U.S. ___, 105 S. Ct. 733, 748, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985) (Powell, J., concurring). This view was joined by Justice Sandra Day O'Connor.
8. W. Burger, *School Safety Goes to Court*, School Safety, National School Safety Center 4-5 (Winter, 1986).
9. A checklist is provided in Chapter Four, *infra*, to assist in evaluating victims' rights and remedies.
10. For the six-year period from the 1973-1974 school year, the Los Angeles Unified School District had 51,785 *reported* crimes including 5,290 assaults, 859 arsons, 12,242 thefts, 6,245 vandalisms and 27,149 burglaries. Not counting medical expenses to schools or to assault victims, the total fiscal losses to crime during the six-year period were more than $23.9 million. This figure does not include related costs of: 1) roughly $9 million in annual security force costs for the District; 2) fire and burglary alarm and response costs; 3) chain link fence costs; and, 4) insurance costs. G. Deukmejian, *A Lawsuit to Restore Safety in the Schools* 1-2 (Crime Prevention Center of the Office of the California Attorney General, 1980).

School District.[11] The basic thrust of the lawsuit was an attempt to establish a bedrock legal principle that public school students have special status and because of that special status, are entitled to special protections and rights under the laws of California including, specifically, the right to attend safe schools.[12] According to the lawsuit, children were being compelled to attend schools where conditions exist which adults would never tolerate in the work place.[13] The lawsuit was brought on behalf of the school children who could not speak for themselves with the hope that schools could be made islands of safety in which students could pursue their learning without fear.[14]

Five arguments were raised in the case against the Los Angeles Unified School District, all of which relied on the view that crime and violence at schools deny constitutional rights: 1) When students are required to attend school by compulsory education laws, much like prisoners are involuntarily confined, an excessive level of crime and violence violates students' rights against cruel or unusual punishment; 2) when that crime and violence disrupts the learning environment, students are denied a constitutionally protected State-afforded right to a free public education; 3) crime and violence at school denies students a fundamental right to personal security; 4) students are denied equal protection when substantial disparities exist in the level of violence between one district and other school districts; and, 5) students are denied substantive due process rights when they do not receive proper educational opportunities, at the school to which they are assigned, due to crime and violence.[15] Notwithstanding these

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Concern for school safety was also being expressed by others. In a letter dated December 23, 1981, John F. Brown, executive secretary of the California Commission for Teacher Preparation and Licensing stated that the Attorney General's findings and recommendations were similar to those contained in the *Report on Handling Confrontation in the Schools* completed in September, 1980, by an *ad hoc* committee of the Commission. Mr. Brown further stated that there was "compelling rationale for timely, effective solutions to the problem of school confrontation and violence." Letter of John F. Brown to Glen C. Scrimger, California School Safety Center, dated December 23, 1981 (on file with the National School Safety Center).

11. People *ex rel.* George Deukmejian v. Los Angeles Unified School District, *et al.* No. C 323360 (Sup. Ct. County of L. A., filed May 21, 1980).
12. G. Deukmejian, California Attorney General, *A Lawsuit to Restore Safety in the Schools* 3 (Crime Prevention Center of the Office of the California Attorney General, 1980).
13. *Id.* at 4.
14. *Id.* at 3-4.
15. *See* K. Sawyer, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309, 1313 (1983). This article is reprinted in part in the *School Safety Legal Anthology* at 114 (National School Safety Center and Pepperdine University Press, 1985).

A collateral issue which buttresses these arguments is that under some circumstances, threats to a student's health, safety or welfare due to conditions at school may excuse attendance under compulsory education laws. Examples of cases excusing attendance on the basis of victimization or

claims, the courts refused to hold that a school had an affirmative duty to make schools safe.[16]

In an effort to give constitutional parity between the rights of victims and perpetrators of crime and violence, the voters of California responded in 1982 by approving what is commonly known as "The Victims' Bill of Rights."[17] Designated on the ballot as Proposition 8, the amendment of the California Constitution was a comprehensive package of criminal justice reforms each of which was designed to enforce and enhance the rights of law abiding citizens and of the victims of crime, and to restore an appropriate balance between those rights and the rights of accused and convicted criminals.

In its preamble, the measure declares that safeguards for victims rights are necessary "so that the public safety is protected and encouraged . . . ."[18] In addition, the provision states that "[s]uch public safety extends to public . . . school campuses, where students

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safety include: People v. M., 197 Colo. 403, 593 P.2d 1356 (1979); *In re* Foster, 69 Misc. 2d 400, 300 N.Y.F.2d 748, *sub. appeal* 15 Pa. Commw. 203, 325 A.2d 330 (1962); School Dist. v. Ross, 17 Pac. Commw. 105, 330 A.2d 290 (1975). *See generally* Annot., 9 A.L.R.4th 122 (1981) (regarding conditions at school excusing or justifying non-attendance).

16. *Id.* at 1313-14. The Superior Court of Los Angeles County dismissed the case and this was upheld by the Appellate Court. The California Supreme Court refused to hear the case. By that time "The Victims' Bill of Rights" had been approved and the case was effectively rendered moot. The merits of the arguments have thus not been finally resolved.

    In *Flores v. Edinburg Consolidated Independent School District*, a somewhat similar argument was raised. A student was injured in his woodshop class primarily because there was no safety guard on the saw he was using; it had been broken approximately a month earlier. The student claimed that this unsafe condition constituted a negligent deprivation of his constitutional rights and brought an action under 42 U.S.C. §1983. Although the court rejected a claim that requiring a student to use unsafe equipment constituted cruel and unusual punishment for purposes of the Eighth Amendment, it did conclude that a civil rights action could be maintained for the negligent deprivation of due process or liberty rights because of the unsafe conditions. The decision was, however, reversed on appeal on grounds of *res judicata* because of a related State court action. A concuring opinion also questioned whether the facts supported a claim of an official policy, custom, or usage resulting in the unsafe condition. Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 9 Educ. L. R. 181 (S.D. Tex. 1983), *rev'd*, 741 F. 2d 773, 19 Educ. L.R. 838 (5th Cir. 1984), *reh. denied*, 747 F.2d 1465, 21 Educ. L. R. 462 (5th Cir. 1984). *See also* Voorhies v. Conroe Indep. School Dist., 610 F. Supp. 868, 26 Educ. L. R. 868 (S.D. Tex. 1985) (removal of safety guard from saw was not a constitutional tort). It is unlikely that a court would be as reluctant to find that a cause of action exists where students are regularly victimized through intentional, rather than negligent actions. The extent to which civil rights actions may be brought under such circumstances thus remains a developing issue.

17. *See* Proposition 8, June, 1982, Primary Ballot.

    Proposition 8 was largely the work of political activists Paul Gann and Robert McElreath, senior assistant attorney general George Nicholson, state senators John Doolittle and Jim Nielsen, and state assemblymen Alister McAlister and Pat Nolan. U.S. Senator Pete Wilson, Attorney General George Deukmejian, Lt. Governor Mike Curb and San Francisco Supervisor Quentin Kopp also played key roles. In addition, more than 300 police chiefs, sheriffs and district attorneys, joined by some 60 other legislators and countless victims' organizations, including Parents of Murdered Children, contributed significantly.

18. Cal. Const. art. I, sec. 28(a).

and staff have the right to be safe and secure in their persons."[19]

Among the specific rights guaranteed by "The Victims' Bill of Rights" is the right to safe schools. The safe schools provision states that:

> All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.[20]

The Supreme Court of California has upheld the validity of the measure[21] and has succinctly stated that school premises must be "safe and welcoming."[22] The scope of the right to safe schools has been limited by the Court to safety from criminal behavior,[23] although it had been suggested that the right may be more encompassing.[24]

California state officials[25] and state courts[26] now are going about

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19. *Id.*

20. Cal. Const. art. I, sec. 28(c).

    Senior assistant attorney general George Nicholson authored the right to safe schools provision. Mr. Nicholson is now director and chief counsel of the National School Safety Center, 7311 Greenhaven Drive, Sacramento, California 95831. He is also an adjunct professor of education at the Graduate School of Education and Psychology, Pepperdine University. Mr. Nicholson and the National School Safety Center can be contacted regarding current legal developments involving the right to safe schools and school safety legal issues generally.

21. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

22. People v. William G., 40 Cal. 3d 455 (1985).

23. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

24. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (Bird, J., dissenting) (noting that the right could "encompass such diverse hazards as acts of nature, acts of war, environmental risks, building code violations, disruptive noises, disease and pestilence, and even psychological or emotional threats, as well as crime").

25. California has adopted a series of bills designed to address many issues associated with school safety, discipline and campus environment. *See* G. Deukmejian, *School Safety: An Inalienable Right*, School Safety, National School Safety Newsjournal 4 (Fall, 1985).

    A dramatic example of legislative efforts are those of Stanford University Law Professor Byron Sher, a prominent California legislator. Although Professor Sher did not author, support or endorse Proposition 8, he declared in a statement to the California Senate Judiciary Committee on May 22, 1984, that with its passage all students and staff in K-12 schools acquired a constitutional right to attend safe, secure and peaceful schools.

    Enabling legislation is *not* required to enforce the right to safe schools. However, Professor Sher led successful efforts to enact legislation to assist its enforcement. A permanent statewide school crime statistical tracking system was adopted. Cal. Penal Code § 628 *et seq.* Further, the California Attorney General is required to prepare and regularly update a complete summary of penal and civil law pertaining to crimes committed against persons or property on school grounds. The State Superintendent of Public Instruction must duplicate and distribute that publication to all schools. Parents are to be notified that it is available. Cal. Penal Code § 626.1.

26. One of the first cases in which the California constitutional right to safe schools was raised is *Hosemann v. Oakland Unified School System*, No. 583092-9 (Superior Court, Alameda County, California, filed March 19, 1984). Information and material regarding the case may be obtained from the National School Safety Center, Sacramento, California.

    The case involves Stephen Hosemann, a seventh grader at Montera Junior High School in the Oakland Unifed School District. During the 1980-1981 school year, Edward Hardy, an eighth grader at the school stole Stephen's watch and then tried to get Stephen to buy it back. Instead, Stephen re-

translating its constitutional mandate into the reality of a secure school environment.[27] The full impact of the California right to safe schools remains to be developed by the courts, much like other constitutional guarantees.[28] However, the declared intention of those who drafted the provision was that the right is mandatory and self-executing[29] and, as such, should avoid various defenses to claims made against schools for a failure to provide a safe and welcoming school environment.[30] Its implementation contemplates the possibility of substantial new or increased expenditures for school security costs,

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ported the incident to Principal James Welsh. Hardy was ultimately suspended for extortion, but sent word back to school threatening Stephen's life. Hardy was then expelled and sent to an "opportunity" school.

At the beginning of the 1981-1982 school year, when Stephen was in eighth grade, Hardy trespassed on the school's grounds, and threatened and accosted Stephen as he approached his school bus to go home. After this incident, Welsh contacted Hardy's "opportunity" school and asked that he be notified whenever Hardy was not at school so as to be alert to the possibility that Hardy might be trespassing at Montera. Hardy was briefly suspended from the "opportunity" school for fighting.

On June 15, 1983, the last day of Stephen's ninth-grade year at Montera, Hardy appeared again, accosted Stephen as he was leaving class, held him up against a wall and hit him several times in the face. Only the intervention of a fellow student saved Stephen from a worse beating.

Stephen and his mother contacted Welsh who, in turn, contacted the police. The investigation was limited. However, Hardy was subsequently placed in the Alameda County Camp for juveniles, Los Cerros, for a different crime.

Stephen was to enter Skyline High School in the fall. In September, 1983, Stephen's mother learned that Hardy was also scheduled to re-enter Skyline on his release from Los Cerros. After concerns were expressed, Hardy was placed in another high school and prohibited from going on the Skyline campus. However, Hardy's parents began efforts to have him transferred to Skyline. These efforts persisted until Attorney Kevin S. Washburn of Oakland, California, filed an action against the school, Hardy and Hardy's parents on behalf of the Hosemanns grounded in large part on Stephen's constitutional right to safe schools.

As of this writing, the case has yet to be concluded. Since it was filed, however, Stephen apparently has not be harassed further by Hardy, although Hardy has been at the Skyline campus several times and has fought with other students while there. Importantly, the suit has also called community attention to school crime and violence problems in the Oakland Unified School District.

27. W. Burger, *School Safety Goes to Court*, School Safety, National School Safety Center Newsjournal 4 (Winter, 1986).

28. According to Justice Stanley Mosk of the Supreme Court of California:

> Obviously the foregoing provision is general in chracter, no specifics are indicated. However that is true of all our basic rights. Section 1 of Article I [of the California Constitution] is no more precise: it guarantees our right to be free and independent, to enjoy life and liberty, and to pursue and obtain safety, happiness and privacy. S. Mosk, *Education and the Law* at 7, presented October 23, 1985, at the National School Safety Leadership Symposium, Jacksonville, Florida.

29. K. Sawyer, *The Right To Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309 (1983). *See also* F. Carrington and G. Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 *Pepperdine* L. Rev. 1, 11-12 (Symposium Edition, 1984); G. Nicholson, *School Safety and the Legal Community*, School Safety Legal Anthology 142, 145 (National School Safety Center and Pepperdine University Press, 1985); G. Nicholson, F. Hanelt and K. Washburn, *Liability for Injuries to Staff on School Grounds: A Means of Avoiding the Exclusive Remedy Rule*, Forum, Vol. 16, No. 1, 22 (California Trial Lawyers Association, January/February 1986); G. Nicholson, F. Hanelt and K. Washburn, *Of Inalienable Rights and Exclusive Remedies*, 30 Educ. L. R. 11 (1986); *California Ballot Pamphlet*, Primary Election, June 1982, at 32, 55.

30. *Id.* G. Nicholson, *Campus Safety and the California Supreme Court*, Thrust for Educational Leadership 33 (Association of California School Administrators, Feb./March, 1986); G. Nicholson,

including as but two examples, expenses for school security guards and safety devices, and enhanced exposure to payments of tort damages and legal fees at the possible expense, if necessary, of books, equipment, and more traditional operational and maintenance expenditures,[31] and may well involve judicially designed and enforced plans to alleviate crime and violence on school campuses if schools fail to act.[32]

Tort Law Right to Safe Schools

The lead of California in providing a constitutional right to safe schools has yet to be followed by other states. What has developed, though, is a trend in the law to hold third-party defendants, including schools, liable for injuries sustained by victims of crime and violence.

Campus Drug Dealers: Look Out, California Peace Officer #41 (California Peace Officers Association, March 1986); and G. Nicholson, *"Preserving Campus Safety: A New Look,"* Prosecutor's Brief, (California District Attorneys Association, Spring, 1986).

A common defense raised is cases against schools arising from crime and violence is whether there is a duty to protect the student. The California constitutional right to safe school clearly establishes that right. *Cf.* Lopez v. Southern California Rapid Transit Dist., 40 Cal. 3d 780 (1985) (finding a duty to protect passengers aboard transit district's buses based merely on statutory duty). *See also* Chapters Six (regarding immunity defenses) and Seven (regarding the duty-at-large rule) *infra.*

31. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 288, 186 Cal. Rptr. 30 (1982) (refusing to invalidate right because of potential expenditures and noting that comparably broad constitutional rights have not produced financial ruin).

When Proposition 8 was presented to the voters of California, they were well aware that the measure could result in significant additional costs. The California Attorney General, in the official title and summary of Proposition 8 contained in a pamphlet provided to all California voters prior to the vote, stated:

> Approval of the measure [Proposition 8] would result in *major state and local costs.* The measure could: . . . ; *increase claims* against the state and local governments relating to enforcement of the right to safe schools; *increase* school security *costs* to provide safe schools; . . . . (Emphasis added.) *California Ballot Pamphlet*, Primary Election, June 1982, at 32.

This was further reinforced by the legislative analysis in the pamphlet which stated:

> We conclude, however, that approval of the measure [Proposition 8] would result in *major state and local costs.* This is because the measure, taken as a whole, could: . . . - *increase claims* against the state and local governments relating to enforcement of the right to safe schools; *increase* security *costs* to provide safe schools, ... (Emphasis added.) *California Ballot Pamphlet*, Primary Election, June 1982, at 55.

The apparent intention of the California constitutional right to safe schools is to: 1) mandate provision of necessary security for all California public schools, at all levels, regardless of cost; and, 2) guarantee that any failure to implement the mandate will allow civil damage actions by students and staff who are injured as a result of that failure. G. Nicholson, F. Hanelt and K. Washburn, *Liability for Injuries to Staff on School Grounds: A Means of Avoiding the Exclusive Remedy Rule*, Forum, Vol. 16, No. 1, 22 (California Trial Lawyers Association, January/February, 1986); G. Nicholson, F. Hanelt and K. Washburn, *Of Inalienable Rights and Exclusive Remedies*, 30 Educ. L. R. 11 (1986).

32. K. Sawyer, *The Right To Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309, 1327-32 (1983); and see *Brown v. Board of Education*, 347 U.S. 483, 74 S.C.T. 686, 98 L.Ed. 873 (1954).

Precedent for imposing this duty is found in those cases where courts have assumed jurisdiction of schools in school desegregation cases to enforce the constitutionally protected right of equal protection. *See* Green v. County School Bd., 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968); Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1963). *See generally* J. Rapp, *Education Law* § 10.01 (Matthew Bender & Company, Incorporated).

Victims have thus responded to crime and violence in schools by demanding schools either assure a safe and orderly school environment or compensate them for their injuries.

In victims' rights litigation, courts have held that although a school may not be expected to be a guarantor or insurer of the safety of its students, it is expected to provide, in addition to an intellectual climate, a physical environment harmonious with the purposes of an educational institution.[33] This expectation is considered particularly appropriate in the closed environment of a school campus[34] or where, as in school, there is custody of [35] and an absolute right to control students' behavior.[36]

Where not provided by express constitutional right, as in California, the developing right to safe schools includes the right of students and staff:

* To be protected against foreseeable criminal activity.[37]
* To be protected against student crime or violence which can be prevented by adequate supervision.[38]
* To be protected against identifiable dangerous students.[39]
* To be protected from dangerous individuals negligently admitted to school.[40]
* To be protected from dangerous individuals negligently placed in school.[41]
* To be protected from school administrators, teachers and staff negligently selected, retained or trained.[42]

The California constitutional right to safe schools no doubt provides an even more certain assurance of safety than is provided by tort law.[43]

The victims' rights movement has come to our Nation's schools.

33. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 967, 25 Educ. L. R. 876 (1985). *See generally* Chapter Eight *infra*.
34. Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842, 19 Educ. L. R. 689 (1984).
35. McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (Wash. 1953).
36. Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985).
37. *See* Chapter Seven *infra*.
38. *See* Chapter Eight *infra*.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. Not only does a constitutional right to safe schools clarify the existence of the right, but will no doubt avoid many of the defenses which could be raised in cases brought by victims such as a lack of a duty under tort law, immunities or the availability of workers compensation. Additionally, it can be the foundation of civil rights actions because the right is a constitutionally guaranteed inalienable right. *See* Chapters Four and Six *infra*.

Chapter III

The Victims' Rights Movement

Less than a decade ago, an article inquired: "Victims' Rights - A New Tort?"[1] The article recognized that until very recently, victims' lawsuits were seldom filed, rarely collectible against the perpetrator himself and historically unsuccessful against third parties who may have contributed to the perpetrator's crime or violence by their own negligence. The emerging trend was that victims were using the civil courts in order to vindicate their rights, and courts and juries were beginning to lend a sympathetic ear. The victims' rights movement had begun.

A significant element in the victims' rights movement is the trend towards *third-party* lawsuits. Victims of crime and violence, often dissatisfied and disillusioned by the results of the criminal justice system,[2] bypass their primary action against the perpetrators and assert their rights of action against third parties whose negligence put the perpetrator in a position to victimize or who failed to prevent the victimization.

The Connie Francis Case

The idea of third-party defendants in victims' rights cases is not new. Third-party defendants in such cases dates back to at least the early 1900's.[3] At that time, United States Supreme Court Justice Benjamin N. Cardozo also noted that "justice, though due to the accused, is due the accuser also."[4] The treatment of victims of crime and violence was nevertheless characterized as a national disgrace.[5] More recent

1. F. Carrington, *Victims' Rights - A New Tort?*, 14 Trial 39 (June, 1978). *See also* F. Carrington, *Victims' Rights - A New Tort?: Five Years Later*, 19 Trial 50 (December, 1983).
2. *See generally* F. Carrington, *The Victims* (1975).
3. *See* Neering v. Illinois Central R. R., 383 Ill. 366, 50 N.E.2d 497 (1943).
4. Snyder v. Massachusetts, 291 U.S. 97, 122, 78 L. Ed. 674 (1934).
5. 71 A.B.A. J. 25 (December, 1985).

impetus was given to the victims' rights movement by a case involving singer Connie Francis.[6]

Connie Francis Garzilli was an internationally known recording artist, who in 1974 had sold some 80 million records. She was then commanding fees of about $35,000 for an eight-performance engagement.

In 1973, Connie Francis married Joseph Garzilli, an international travel agent. Subsequent to this marriage and the loss of her child in July, 1974, she resumed her professional career. Her first engagement was to entertain at the Westbury Music Fair in Westbury, Long Island.

In connection with this engagement, Connie Francis took rooms at the Howard Johnson's Motor Lodge in Westbury. The rooms were on the second floor of the motel and had sliding glass doors leading to a balcony on the outside of her room. In the early morning hours, an unknown man entered her room through the sliding glass doors and criminally assaulted her.[7] The assailant was never caught.

Connie Francis sued Howard Johnson's Motor Lodges, Inc., for negligence in failing to provide security. Her husband joined the suit alleging loss of her companionship, society, and services in connection with his business. After a four-week jury trial, Connie Francis was awarded $2.5 million compensatory damages and her husband was awarded $150,000. She later settled for $1.5 million[8] and her husband's award was reduced to $25,000.[9]

The legal theory on which Connie Francis' suit was based was the special duty of security owed by innkeepers to guests. She claimed that this duty was breached through the negligence of Howard Johnson's and that this negligence was the proximate cause of her injury.

With regard to the issue of duty, Connie Francis alleged that: 1) Howard Johnson's was under a legal obligation to keep and maintain its premises in a reasonably safe condition so as not to expose its guests to an unreasonable risk of injury, including attacks by third parties; 2) while not an insurer of the safety of its guests, it was under

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6. Garzilli, *et al.* v. Howard Johnson's Motor Lodge, Inc., 1975 C 979 (E.D.N.Y. 1975). *See also* Garzilli v. Howard Johnson's Motor Lodge, Inc., 419 F. Supp. 1210 (E.D.N.Y. 1976) (denying defendants' motions for a judgment notwithstanding verdict and for a new trial as to Francis, and granting defendants' motion for new trial as to her husband unless he accepted a reduction in his award).
7. Her husband was away on a business trip.
8. 71 A.B.A. J. 25 (December, 1985).
9. Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210, 1214 (1976).

an obligation to take those measures of protection for its guests which were within its power and capacity to take and which could reasonably be expected to lessen the risk of injury to its guests, including providing safe and adequate locking devices for sliding glass doors; and, 3) the duty of care varies with the grade and quality of the accommodations that the innkeeper offers; in the instant case, Howard Johnson's held itself out as offering first-class accommodations.[10]

Connie Francis alleged that Howard Johnson's was negligent in that it knew of a defective condition on the premises with respect to the sliding glass doors. The court noted that "the doors gave the appearance of being locked, but the testimony showed they were capable of being unsecured from the outside without much difficulty."[11] Expert testimony had established that the lock on the sliding glass door to the room was, in fact, defective. Its manager actually had knowledge of the defects in the doors because he had ordered safety devices for sliding glass doors - so-called "Charley Bars" - several months before the assault but they had not been installed. Evidence from the records of the County Police Department further indicated that in the year 1974 there had been several prior unauthorized entrances to guests' rooms through the sliding glass doors.

The notoriety of the Connie Francis case came not only from the prominence of the plaintiff and the size of her award, but also because of the legal theory raised.[12] Just as others - racial minorities, women, homosexuals and prisoners, to name only a few - had turned to the courts for protection and enforcement of their perceived rights, so victims of crime and violence were motivated in larger numbers to bring lawsuits similar to Connie Francis' to gain their rights as victims. Whereas prior to the Connie Francis case few recognized that victims of crime and violence constitute a class with rights which they are entitled to have enforced,[13] victims and their advocates have since coalesced efforts toward vindicating these rights.[14]

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10. This information is taken principally from requests for jury instructions and related authority presented in the case.

11. Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210, 1212 (E.D.N.Y. 1976).

12. *See* 71 A.B.A. J. 25 (December, 1985).

13. F. Carrington, *The Victims* 236 (1975).

14. Even the authors of the American Civil Liberties Union handbook regarding victims' rights note:

> As the disclaimer at the beginning of this book explains, the discussion of victims' rights contained here is not meant to reflect the policy of the American Civil Liberties Union. The goal of the authors has been to provide an overview of the emerging issues for crime victims, accurately and comprehensively. While their descriptions and explanations do not represent

Victims' Rights Movement Initiatives

Interest in the victims' rights movement has spawned various organizations devoted to the legal[15] and non-legal[16] aspects of victims' rights. These organizations have done a great deal to enhance the rights, and particularly the legal rights, of crime victims to a

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an attempt to formulate an ACLU policy in this important new area, wherever possible the authors have tried to be mindful of the traditional ACLU concerns for protecting the rights of both the accused and prisoners, as well as protecting the right of freedom of speech. The authors feel strongly that crime victims deserve the rights described in this book and that in most instances these rights do not conflict with the concerns of accused persons, prisoners, and free speech. J. Stark and H. Goldstein, *ACLU Handbook, The Rights of Crime Victims* 7-8 (1985).

15. Organizations whose major thrust involves the law as it pertains to victims' rights include:

Center for Criminal Justice Policy and Management (CCJPM), University of San Diego Law School, Alcala Park, San Diego, California. CCJPM was founded by Edwin L. Meese, III, Attorney General in the Reagan Administration. Although its programs are wide-ranging, special interest is directed to the area of victims' rights.

National District Attorneys Association, Inc. (NDAA), Alexandria, Virginia. NDAA is an umbrella organization for the Nation's district or state's attorneys. Its expertise covers almost every area in criminal justice. Beginning about 1972, NDAA established the victim/witness pilot programs, which have been emulated throughout the Nation. In addition to coordinating the victim/witness programs, NDAA produces studies on victims rights from the perspective of the prosecutor and participates in seminars and workshops on the subject.

National Judicial College (NJC), University of Nevada, Reno Campus, Reno, Nevada. NJC is a privately endowed school for advanced education for the judiciary. Its curriculum includes a wide range of academic courses to educate new judges and assist experience judges in keeping up with developments in the law. In recent years, programs have been included on victims' rights.

National School Safety Center (NSSC), Sacramento, California. NSSC is a partnership of the U.S. Department of Justice, U.S. Department of Education and Pepperdine University. NSSC's mission is to coalesce public, private and academic resources throughout the United States and to provide a central headquarters to assist school boards, educators, law enforcers, lawyers and the public to ensure all our schools are safe, secure and peaceful places of learning. Among information made available through NSSC is information regarding the rights of school crime and violence victims and the related responsibilities of schools.

Victims' Assistance Legal Organization, Inc. (VALOR), McGeorge School of Law, Univesity of the Pacific, Sacramento, California (West Coast headquarters), and Virginia Beach, Virginia (East Coast headquarters). VALOR was established in 1979 by Frank Carrington, as a national clearinghouse of legal information dealing exclusively with victims' rights. VALOR consults with victims' attorneys across the Nation, providing case law, research, model pleadings and so on. In addition, VALOR conducts workshops and other educational programs for both victims' litigators and potential defendants (e.g., correctional officials, hotel and motel operators, government officials, schools, etc.). VALOR was formerly known as the Crime Victims Legal Advocacy Institute, Inc. California attorneys and victims can receive assistance from VALOR through the McGeorge School of Law by telephoning 1-800-VICTIMS.

Victims Committee, Criminal Justice Section, American Bar Association (ABA Victims Committee), American Bar Association, Chicago, Illinois. The ABA Victims Committee was established in 1973 to represent the rights of crime victims before the legal profession. The Committee publishes papers and distributes information regarding victims' rights.

Victims' Rights Advocacy Project (VRAP), University of Virginia, Charlottesville, Virginia. VRAP is a victims advocacy organization founded in 1982 and operated exclusively by law students. It engages in research for other victim assistance organizations and assists local victim programs in Charlottesville and the State of Virginia on legal matters.

Washington Legal Foundation (WFL), Washington, D.C. WFL is a conservatively-oriented public interest law firm. Although its range of activity is broad-gauged, it has a specific program whereby it files suits without compensation on behalf of victims.

proper status in the criminal and civil justice system.[17]

The efforts of victims' rights organizations have been flanked by legislation at both the Federal and State levels.[18] In 1982, for example, the Victim and Witness Protection Act[19] was enacted by Congress. The Act recognized that: "Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used to identify and punish offenders."[20] The substantive provisions of the Act provide for: 1) victim impact statements at sentencing; 2) protection of victims and witnesses from intimidation; 3) restitution to victims of crime; 4) Federal guidelines for fair treatment of crime victims and witnesses in the criminal justice system; and 5) a general tightening up of bail laws. The Act was intended to serve as a model for similar State legislation.[21]

Legislation has also afforded compensation for victims of crime and violence. In 1984, Congress enacted the Federal Victims of Crime Act.[22] Under the Act, a Crime Victims Fund is established from which a crime victim (or his survivors) may receive medical expenses, lost wages and funeral expenses attributable to crime or violence.[23] A vast majority of States have victim compensation programs.[24] Nevertheless, where compensation is available[25] it is

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16. An organization whose main thrust is non-legal matters involving victims is:
National Organization for Victim Assistance, Inc. (NOVA), Washington, D.C. NOVA is a paramount national organization in the victims field. It serves as a clearing house of information for victim advocates throughtout the Nation, maintaining comprehensive files on legislation, policy issues, current developments and almost anything germane to the victims movement. It also keeps records of State and local victims service organizations currently in existence. Additionally, NOVA publishes a newsletter and, on occasion, scholarly papers on victims' rights generally. It also holds an annual national conference, together with informative workshops across the Nation, on all aspects of victims' rights. As a resource center it has no peer.

17. *See* R. Cronin and B. Borque, *Assessment of Victim/Witness Assistance Projects* (National Institute of Justice, U.S. Dept. of Justice, 1981); P. Woodard and C. Cooper, *Victim and Witness Assistance* (Bureau of Justice Statistics Bulletin, U.S. Dept. of Justice, 1981); S. Salasin, *Evaluating Victim Service* (Sage Publications, Inc., 1981).

18. Most legislation has followed various legislative and executive hearings or studies. For example, in 1982 the President's Task Force on Victims of Crime issued its Final Report which contained 61 recommendations to enhance the rights of crime and violence victims. Not only have these hearings and studies been the basis for legislation, but they have helped call attention to the plight of victims.

19. Pub. L. No. 97-291, 96 Stat. 1248 (1982). *See* 18 U.S.C. §§ 1501, 1512, 1513, 1514.

20. Pub. L. No. 97-291, sec. 2, 96 Stat. 1248 (1982).

21. As a matter of fact, several states, such as California, Nebraska and Wisconsin, were ahead of the Federal government. Nevertheless, the Act did motivate most other States to also adopt such measures. A comprehensive review of State laws pertaining to crime victims may be found in National Organization for Victim Assistance (NOVA), *Victims' Rights and Services: A Legislative Directory*.

22. Pub. L. 98-473, 98 Stat. 2170 (1984). *See* 42 U.S.C. § 10601.

23. 40 U.S.C. § 10602.

24. *See generally* 20 A.L.R.4th 63 (1983) (regarding statutes providing for governmental compensation

limited and hardly compensates victims for their injuries.

Because of the inherent limitations in legislative efforts, victims, like Connie Francis, are turning to third parties to redress their injuries. Victims' rights litigation now represents a new and developing speciality in the personal injury field.[26]

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for victims of crime); D. McGillis and P. Smith, *Compensating Victims of Crime: An Analysis of American Programs* (National Institute of Justice, U.S. Dept. of Justice, 1983).

25. Each program has numerous requirements for eligibility and there are administrative hurdles to deal with. Those who have sought compensation under some programs have found the experience somewhat discouraging.

26. 71 A.B.A. J. 25 (December, 1985). *See also* J. Brown and D. Doyle, *Growing Liability for Premises Owners*, 72 A.B.A. J. 64 (March, 1986).

Chapter IV

Victims' Rights Litigation

Victims' rights litigation[1] is based, at the outset, on traditional tort law principles. Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.[2] Unlike criminal law which is concerned with the protection of interests common to the public at large, often exacting a penalty from the wrongdoer,[3] tort law is directed toward the compensation of individuals, rather than the public, for losses which they have suffered.[4]

Negligence Theory of Tort Liability

There are various theories of tort liability. In victims' rights litigation, negligence is generally the applicable tort theory. Unlike an intentional tort, such as assault or battery, negligence may be based on omissions to act.[5] Thus, for example, where a student is the victim of an assault, a school is not liable for that intentional tort, although the perpetrator would be. However, a school may be liable for failing to protect the student against the assault if the assault was foreseeable.[6]

Negligence involves four elements: 1) a duty, or obligation recognized by law, requiring the actor (*e.g.*, the school) to conform to a certain standard of conduct for the protection of others against unreasonable risks; 2) failure to conform to the standard required; 3) a reasonably close causal connection between the conduct and the

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1. For purposes of this book, victims' rights litigation is limited to tort law remedies. Other remedies, such as those available under victims' compensation laws, workers' compensation laws and others are not generally considered.
2. W. Keeton, *Prosser and Keeton on The Law of Torts* 2 (5th Ed. 1984).
3. There has, of course, been some concern that in the effort to protect the interests of the public at large, the rights of the individual victims of crime have been disregarded and subordinated to the rights of those who perpetrate crime and violence. *See* F. Carrington, *The Victims* (Arlington House, 1975).
4. W. Keeton, *Prosser and Keeton on The Law of Torts* 5-6 (5th Ed. 1984).
5. W. Keeton, *Prosser and Keeton on The Law of Torts* 160 (5th Ed. 1984).
6. *See* Chapters 7 and 8 *infra*.

resulting injury, that is, proximate cause; and, 4) actual loss or damage resulting to the interests of another.[7] In victims' rights litigation, there must be presented, or alleged, a case which establishes all of the required elements of negligence.[8]

Schools, like others, may be held liable if negligent.[9] A school, as an employer, will also be liable for the negligence of its administrators, teachers and other employees committed while acting in the scope of their employment.[10] An administrator, teacher or other school employee is also generally liable for his own negligence.[11] If the facts and law warrant, victims' rights litigation accordingly may be brought against a school as well as its employees.

As in other negligence cases, a victims' claim is subject to negligence defenses. The two most common defenses in a negligence action are contributory negligence and assumption of risk.[12] Contributory negligence is conduct on the part of the plaintiff (i.e., the victim) which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.[13] Students are therefore expected to protect their own self-interests to the extent possible.[14] Under the defense of assumption of risk, it is held that where a plaintiff voluntarily assumes a risk of harm arising from the negligent or reckless conduct of another, he cannot recover from such harm.[15]

The defenses of contributory negligence and assumption of risk have been criticized. The doctrine of contributory negligence, for example, has been considered harsh because it effectively places upon the injured party the entire burden of a loss for which two - both plaintiff and defendant - are, in theory, responsible.[16] This dissatisfaction had led a majority of States to adopt some form of comparative negligence.[17] Under comparative negligence, liability for damages is

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7. W. Keeton, *Prosser and Keeton on The Law of Torts* 164-65 (5th Ed. 1984).
8. Because victims' rights litigation is a rapidly developing area of the law, many reported cases involve pre-trial hearings, such as motions to dismiss. A helpful example of a case which discusses each element of a negligence action is *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983), where a dormitory resident recovered from a college after being raped.
9. This assumes, however, that some special defense or immunity does not apply. *See* Chapter Six *infra*.
10. Restatement (Second) of Agency § 219 (1958).
11. Restatement (Second) of Agency § 343 (1958). Again, this assumes that immunity, privilege or some other defense does not apply. *See* Chapter Six *infra*.
12. W. Keeton, *Prosser and Keeton on The Law of Torts* 451 (5th Ed. 1984).
13. Restatement (Second) of Torts § 463 (1965).
14. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979). *See generally* Chapter 9 *infra*.
15. Restatement (Second) of Torts § 496 A (1965).
16. W. Keeton, *Prosser and Keeton on The Law of Torts* 468-69 (5th Ed. 1984).
17. *See, e.g.*, Li v. Yellow Cab. Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Alvis v. Ri-

apportioned between parties on the basis of fault. If the injured party contributed to his injuries to the extent of, say, 20 percent, damages are reduced by that amount. Although the effect of comparative negligence on the traditional defenses of contributory negligence and assumption of risk varies from State to State, they are commonly abolished, or at least modified.[18]

In addition to negligence defenses, the availability of workers compensation may preclude a claim against an employing school. Under workers compensation acts, an employee, such as a teacher, may recover certain benefits regardless of whether he could have recovered under some tort theory against the employer. Defenses such as contributory negligence and assumption of risk may not be raised by the employer. Workers compensation acts make the employer strictly liable for an employee's injuries regardless of the circumstances. In return, the employee may not bring any action against the school, workers compensation being his exclusive remedy.[19] Most victims' rights litigation in the school setting therefore involves claims by students.

Although exclusivity of workers compensation is the general rule, it is not at all uniform. Some statutes specifically preserve other remedies or allow them to be pursued if, for example, the employer has been grossly negligent or fraudulently failed to disclose serious risks.[20] Further, it has been urged that where a constitutional right is asserted, such as the California right to safe schools,[21] the availability of workers compensation does not preclude seeking damages for a deprivation of that guarantee.[22]

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bar. 85 Ill. 2d 1, 421 N.E.2d 886, 52 Ill. Dec. 23 (1981) (citing jurisdictions adopting comparative negligence).

18. There are three primary comparative negligence systems, including pure, modified, and slight-gross.

Under pure comparative negligence, contributory negligence does not bar recovery (as it would at common law), but reduces an injured party's claim for damages.

Under modified comparative negligence, contributory negligence does not bar recovery if it remains below a specified proprotion of total fault (*e.g.*, 50 percent).

Under the slight-gross system, contributory negligence is a bar to recovery unless "slight," and the defendant's negligence, by comparison, is "gross." If this threshold requirement is met, the injured party may recover his damages, but they are reduced by that portion of negligence attributable to him.

The defense of assumption of risk is incorporated in the comparative negligence system in some States, but not others.

See generally W. Keeton, *Prosser and Keeton on The Law of Torts* 471-75 (5th Ed. 1984)

19. *See* W. Keeton, *Prosser and Keeton on The Law of Torts* 574 (5th Ed. 1984).
20. *Id.* at 576-77.
21. *See generally* Chapter Two *supra*.
22. *See* G. Nicholson, F. Hanelt and K. Washburn, *Liability for Injuries to Staff on School Grounds: A Means of Avoiding the Exclusive Remedy Rule*, Forum, Vol. 16, No. 1, 22 (California Trial Lawyers Association, January/February 1986); G. Nicholson, F. Hanelt and K. Washburn, *Of Inalienable*

Special Considerations in Victims' Rights Litigation

Victims' rights litigation represents a new speciality in the personal injury field.[23] However, certain special considerations arise which differentiate victims' rights litigation from other aspects of personal injury practice.

Victims' cases are probably the most emotional kind of litigation that can be encountered. This is understandable; the plaintiffs in such cases will, by definition, have been injured because of some crime or violence perpetrated against them, with all of the physical and mental trauma that this can cause.

This emotional factor can create problems for attorneys and others dealing with the victim that rarely arise in other cases. For example, given a client with a facially sound case, say a rape, the initial question may well be whether it is in the best interest of the victim to file at all. Perhaps the trauma of reliving the crime in the civil case, often after the victim has testified in a criminal case (and perhaps been subject to energetic cross-examination by defense counsel) will simply be too much of an ordeal for the victim to undergo. It is, of course, the province of a victim to decide whether to pursue a lawsuit, but it is incumbent upon those advising the victim to

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Rights and Exclusive Remedies, 30 Educ. L. R. 11 (1986).

But see Halliman v. Los Angeles Unified School Dist., 163 Cal. App. 3d 46, 209 Cal. Rptr. 175, 21 Educ. L. R. 946 (1984). In *Halliman* a teacher had been injured by a student. Holding that workers compensation was the teacher's exclusive remedy, the California Court of Appeal, Second District, stated:

> Plaintiffs' reliance on California Constitution article I, section 28, as a basis for recovery [under a theory other than workers compensation] is misplaced. Article I, section 28, subdivision (c) provides: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." As part of the "Victim's Bill of Rights," that provision concerns the "broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons" sought in the state criminal justice system. (Cal. Const., art. I, § 28, subd. (a).) It does not purport to create any exception to the exclusive remedy provisions of the workers' compensation laws. *Id.* 163 Cal. App. 3d at 52.

Assuming that the facts in *Halliman* established a failure to provide a safe, secure and peaceful school, the Court of Appeal took a somewhat crabbed view of the California constitutional right to safe schools. A constitutionally guaranteed right may not be curtailed by a workers compensation act or, for that matter, any statute. The right to safe schools may not be denied by statute any more than statutory hearing rights may be deemed to deny constitutionally required due process rights. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. ___, 106 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Educ. L. R. 473 (1985). This is especially so in California where a dual capacity doctrine has been applied in workers compensation cases. Thus, in *Bell v. Industrial Vangas, Inc.*, 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981), a route salesman who was severely injured in a fire while delivering flammable gas could claim workers compensation from his employer and, additionally, could sue his employer as a manufacturer- supplier of a defective product. Similarly, if the facts warrant, a teacher should have a dual remedy against a school. The first would be workers compensation and the second would be for deprivation of a constitutionally guaranteed right to safe schools.

23. 71 A.B.A. J. 25 (December, 1985).

determine what sort of witness the client will make, and the emotionalism inherent to victims' cases can have a distinct bearing upon this determination.

The very nature of the case additionally can affect the motivation of the victim in bringing a lawsuit. Such emotions as outrage over the crime, retribution, disgust with the criminal justice system or a desire to prevent such future crimes may be prime factors in the desire to sue, over and above any monetary compensation to be gained. Where the victimization occurs at a school, emotions can even be greater because of the concern of other students and their parents.

Alternative Remedies

Because of the nature of victims' rights litigation, consideration should be given by victims to other remedies which may be available.

A child, as a separate legal individual, has been held liable for his own torts,[24] and the parent has, at common law, no legal responsibility for them.[25] Since the child is usually not financially independent and the parent is not liable, juvenile torts are mostly uncompensated unless the child is covered by some liability policy.[26] This has led to the enactment of statutes in most States which make parents liable for the acts of their children who are not yet adults, particularly if the damage results from some intentional conduct.[27] These statutes are adopted to serve two goals: 1) to compensate victims of crimes by imposing liability, but vicariously, on parents of children who intentionally or maliciously harm the person or property of another; and, 2) deter crime by encouraging increased parental supervision.[28] Although these statutes have been repeatedly upheld as against

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24. Restatement (Second) of Torts § 8951 (1979).

25. A parent may, nevertheless, be subject to liability under some other theory. For example, a parent may be negligent by making loaded firearms available to a child. *See* Restatement (Second) of Torts §308 (1965).

    It has been argued, but has not yet been resolved, the extent to which parents can be held responsible for their child denying a student a constitutional right to a safe school. *See* Chapter Two *supra*.

26. W. Keeton, *Prosser and Keeton on The Law of Torts* 913 (5th Ed. 1984).

27. *See generally* Annot., 8 A.L.R.3d 612 (1966) (regarding the validity and construction of statutes making parents liable for torts committed by their minor children). *See also* J. Goldman, *Restitution for Damages to Public School Property*, 11 J. of L. & Educ. 147 (1984); D. Prescott and C. Kundin, *Toward a Model Parental Liability Act*, 20 Cal. W. L. Rev. 187 (1984); Shong, *The Legal Responsibility of Parents for their Children's Delinquency*, 6 Fam. L. Q. 145 (1972); Freer, *Parental Liability for Torts of Children*, 53 Ky. L. J. 254 (1965); Note, *The Iowa Parental Responsibility Act*, 55 Iowa L. Rev. 1037 (1970) (citing various statutes); Comment, *Parental Responsibility Ordinances*, 19 Wayne L. Rev. 1551 (1973).

28. Note, *The Iowa Parental Liability Act*, 55 Iowa L. Rev. 1037 (1970).

constitutional challenge,[29] the ability of these statutes to serve either of these worthy purposes has been limited by the fact that damages which may be recovered are commonly limited to about $750.00.[30] Where not so limited, such statutes may provide a significant remedy to a victim.[31]

If schools or school administrators, teachers or staff are not fulfilling their obligations to provide safe schools, administrative remedies may be available to enforce these obligations. Many of these remedies will be within the structure of local, regional or State education agencies. Outside agencies may provide remedies as well. Where female students are being victimized, for example, it has been suggested that a charge could be made under Title IX of the Education Amendments of 1972.[32]

Victims of crime and violence may have claims against agencies other than schools. Circumstances may, for example, warrant a claim against law enforcement agencies for negligently releasing an individual from prison[33] or for failing to provide police protection.[34] If the perpetrator has revealed his intent to victimize to a third party, such as a psychotherapist, that third party may be liable for failing to warn the intended victim.[35] Other private parties may be liable as well.[36]

Victims' rights initiatives may also be available. Federal or State victims compensation laws provide some benefits to victims.[37]

Checklist for Victims' Rights Litigation

Whether pursuing or defending a victims' claim, various matters

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29. W. Keeton, *Prosser and Keeton on The Law of Torts* 913 (5th Ed. 1984). *But see* Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971) (unlimited liability).
30. J. Goldman, *Restitution for Damages to Public School Property*, 11 J. of L. & Educ. 147, 152 (1984).
31. *See* Palmyra Bd. of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959) (school awarded $344,000 in damages under parental responsibility statute where child started fire at school).
32. 20 U.S.C. §§ 1681, 1682. *See* N. Hauserman and P. Lansing, *Rape on Campus: Postsecondary Institutions as Third Party Defendants*, 8 J. Coll. & U. L. 182, 201 (1981).
33. *See generally* Annot., 6 A.L.R.4th 1155 (1981) (governmental tort liability for injuries caused by negligently released individual); Annot., 5 A.L.R.4th 773 (1981) (immunity of public officer from liability for injuries caused by negligently released individual); 19 Am. Jur. Proof of Facts 2d 583 (1979) (government entity's liability for injuries caused by negligently released individual).
34. *See generally* Annot., 46 A.L.R.3d 1084 (1972) (liability of municipality or other governmental unit for failure to provide police protection); 22 A.L.R. Fed. 903 (1975) (liability of United States under Federal Tort Claims Act for injuries resulting from failure to provide police protection).
35. Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).
36. Annot., 10 A.L.R.3d 619 (1966) (regarding private person's duty and liability for failure to protect another against criminal attack by third person).
37. *See* Chapter Three *supra*.

should be considered. A checklist[38] of these considerations follows:

- ☐ Do the facts and the law warrant a lawsuit against the perpetrator?
- ☐ Is there any basis or likelihood of a lawsuit by the perpetrator against the victim?
- ☐ Do the facts and the law warrant a lawsuit against any third party, including a school or school employee?
- ☐ What is the time period, or statute of limitations, for filing a lawsuit?
- ☐ What theory of third-party liability is available?
  - * Constitutional right to safe schools?
  - * Failure to protect against criminal activity generally?
  - * Failure to protect against specific foreseeable criminal activity (*e.g.*, assaults, drug trafficing, etc.)?
  - * Failure to supervise students?
  - * Failure to apprehend or restrain identifiable dangerous students?
  - * Negligent admission of dangerous students?
  - * Negligent placement of dangerous students?
  - * Negligent selection, retention or training of staff?
  - * Contract (*e.g.*, dormitory)?
  - * Statutory (*e.g.*, parental responsibility)?
  - * Other?
- ☐ Consider what remedy or remedies should be sought?
  - * Damages against the perpetrator or one or more third parties (*e.g.*, school, school officials, perpetrator's parents, etc.)?
  - * Writs of mandamus?[39]
  - * Injunctions?[40]

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38. This checklist is prepared in a format of questions which the victim must consider. The third-party defendant should necessarily consider whether these questions can be answered in the defendant's favor. The issues raised by the checklist are discussed throughout this book.
39. Mandamus is Latin for "we command." A writ of mandamus is generally a remedy by which a court, or a superior authority, directs or commands an official to perform some public duty.

    Under some practice, a writ of prohibition may also be used much like a writ of mandamus. However, it is most often used to prevent a court (as opposed to some other official) from acting beyond its jurisdiction.
40. Injuctions are issued by a court directing that a party do or not do something. There are various types of injuctions. In general, some are issued prior to a case being concluded to preserve the *status quo* and others are issued upon the conclusion of the case. Unlike a writ of mandamus which is usually issued to some public official directing the official to perform some ministerial act, injunctions are

* Declaratory judgments?[41]
* Other?

☐ In what manner should any suit be brought?
* Individual action?
* Class action?[42]
* Private attorney general or public interest action?[43]
* Other?[44]

☐ Will a remedy selected exclude other remedies selected?

☐ Are there any organizations which can assist in bringing, researching, or litigating the case?[45]

☐ Must a tort liability claim or other notice be served upon the school?[46] If so, by when must it be served?

☐ Is the school entitled to claim any common law or statutory immunities?[47]
* Sovereign or absolute immunity?
* Official or qualified immunity?
* In loco parentis immunity?
* Charitable immunity?
* Statutory immunity?

☐ Has any available immunity been waived by insurance or otherwise?[48]

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directed to public or private persons and may be issued to compel discretionary matters. Injunctive relief is commonly sought in desegregation cases by which a court may ultimately assume jurisdiction of the design and implementation of a school's desegregation plan. Similarly, such relief may be available to require the design and implementation of a safe school plan. *See* Chapter Two *supra*.

41. Where declaratory relief is sought, the party bringing the suit is not seeking any specific remedy, such as damages. Rather, the party merely seeks a determination by a court of the respective rights and obligations of the parties. Significantly, the party need not have suffered any actual wrong or sustained damages. Declaratory relief is often sought in conjunction with other remedies.
42. A class action is brought on behalf of or, in some limited circumstances, against other persons similarly situated.
43. Practice in many States allows private persons to bring actions in the public interest, particularly where public officials fail to act. Attorney's fees often may be recovered in these actions. *See* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (Serrano I); *subsequent opinion*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (Serrano II).
44. Local practice should be consulted to determine remedies available under State law.
45. *See* Chapter Two *supra*.
46. *See* Chapter Six *infra*.
47. *Id.*
48. *Id.*

☐ To what extent was the crime or violence foreseeable by the school?
* School crime statistics?
* Specific events?
* Community or gang crime, violence or drug activity?
* High crime area?
* Student, parent, staff or community complaints?
* News media accounts?
* Presence of former students?
* Presence of non-students?
* Gathering place for likely perpetrators?
* Other?

☐ To what extent has the school attempted to prevent or protect against the crime or violence?
* Warnings to potential victims?
* Programs for students?
* Closed campus?
* Lighting?
* Increased staff presence?
* Security patrols or guards?
* Parking lot attendants?
* Escort services?
* Policy to report crime or violence to police?
* Emergency telephone or other services?
* Other?

☐ Is liability affected by any special contracts or student-school relationships?
* Dormitory contracts?
* Catalog representations regarding safety?
* Statements by administrators, etc.?
* Payment of tuition or fees?
* Other?

☐ What likely defenses can be raised?
* Duty-at-large rule?
* Intervening cause doctrine?
* Contributory negligence?
* Assumption of risk?
* Comparative negligence?
* Other?

- ☐ Are there any remedies which can or should be pursued other than a third-party suit?
  - * Claims under parental responsibility acts?
  - * Administrative remedies?
  - * Criminal prosecution and possible perpetrator restitution?
  - * Crime victims compensation?
  - * Workers compensation?
  - * Occupational health and safety acts?
  - * Violation of building or design codes or standards?
  - * Home owner or other insurance?
  - * Other?

Chapter V

Classifications of Victims' Rights Litigation

Victims' rights litigation can be broadly classified into three main areas. These include lawsuits by victims against perpetrators; by perpetrators against victims; and, victims against third parties.

Victims Against Perpetrators

Crime or violence directed against another will usually give the victim (or the victim's survivors) a cause of action against the perpetrator. Lawsuits brought by victims against perpetrators are not, as a rule, difficult to win, particularly if there has been a guilty plea or conviction for the crime out of which the action arose.[1] Indeed, because criminal actions are typically disposed of before civil proceedings, the civil litigant will actually have a "preview" of what to expect when he begins to prepare his case.

Where a perpetrator is acquitted in criminal proceedings, a civil action is not necessarily barred because of the differences in the burdens of proof - the State must prove guilt beyond a reasonable doubt, while a civil plaintiff, in most instances, need only establish proof by a preponderance of the evidence.[2] Further, evidence which is inadmissible in the criminal case, such as evidence seized in violation of a suspect's Fourth Amendment's rights[3] may be,[4] but is

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1. Absent a statute to the contrary, pleas of guilty in criminal cases are usually admissible in subsequent civil actions as a declaration or admission against interest. 29 Am. Jur. 2d *Evidence* § 701 (1967). Pleas of *nolo contendere* (no contest) and convictions by a court or jury are usually inadmissible in civil actions. 29 Am. Jur. 2d *Evidence* §§ 334, 702 (1967).
2. 29 Am. Jur. 2nd *Evidence* §335 (1967).
3. *See* Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).
4. *See, e.g.*, Honeycutt v. Aetna Insurance Co., 510 F.2d 340 (7th Cir. 1975); Diener v. Mid American Coaches, Inc., 378 S.W.2d 509 (Mo. 1964).

   The trend clearly allows admission of such evidence in civil cases, although not admissible in criminal cases. *See* W. LaFave, *Search and Seizure* 106 (1978); H. Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of Classic Mismatch* (pts. 1 & 2), 51 Tex. L. Rev. 1325 (1973), 52 Tex. L. Rev. 621 (1974); J. Sutherland, *Use of Illegally Seized Evidence in Non-Criminal Proceedings*, 4 Crim. L. Bull. 215 (1968); Note, *Constitutional Exclusion of Evidence in Civil Litigation*, 55 Va. L. Rev. 1484 (1969).

not always,[5] admissible in a civil case.

No matter how clear-cut the evidence of the civil defendant-perpetrator's guilt may be, the major problem in lawsuits by victims against perpetrators boils down to whether a monetary judgment is collectable.

Realistically, *most* crime and violence are not committed by the wealthy. And, if the perpetrator is serving a prison sentence for the crime in question, he probably will be the epitome of the judgment-proof defendant. Nor, as a probationer or parolee, will he be an attractive candidate for any well-paying jobs. The dilemma thus arises: Is it worth the time of a busy attorney, or the time and trauma to the victim, even to bother to sue the perpetrator?

Some victims may wish to sue as a kind of catharsis. After receiving a likely uncollectible judgment of $365,000 against two men who had been convicted of raping her, one victim was candid in saying that the "purpose of this trial wasn't to collect. The purpose of this trial was that it's high time somebody got off their tail and did something about rape."[6]

Others may wish to simply establish the guilt of the perpetrator where the criminal justice system did not, or could not, do so. When the United States Supreme Court required that suspects be given so-called Miranda warnings, for example, dissenting Justice Byron R. White predicted that "in some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."[7] Similarly, a criminal defendant may be innocent of a criminal charge by reason of insanity.[8] Where such things happen, victims may wish to use civil proceedings to establish guilt.

As unlikely as collection may be against crime and violence perpetrators, there are exceptions.

In a number of cases, criminals have turned authors or lucrative offers are made to them for interviews or story rights. Truman Capote probably started the trend with his classic "non- fiction novel" *In Cold Blood*,[9] detailing the murder of the Clutter family in Kansas, the

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5. *See, e.g.*, Tannvasa v. City and County of Honolulu, 626 P.2d 1175 (Hawaii Ct. App. 1981); Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958); Kassner v. Fremont Mutual Insurance Co., 47 Mich. App. 264, 209 N.W.2d 490 (1973). *See also* Note, *Constitutional Law: Evidence Obtained Through a Private Unreasonable Search and Seizure Inadmissible in a Civil Action*, 46 Minn. L. Rev. 1119 (1962).
6. Washington Post, Feb. 1, 1976, Section B, col. 1. The victim's name was Mary Knight.
7. Miranda v. Arizona, 384 U.S. 436, 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (White, J., dissenting).
8. Mentally disabled persons generally may be held liable in tort. *See* W. Keeton, *Prosser and Keeton on The Law of Torts* 1072-74 (5th Ed. 1984); Restatement (Second) of Torts §895J (1979).

subsequent investigation, trial, conviction and eventual hanging of Perry Smith and Richard Hitchcock for that robbery-motivated crime. It is ironic, but understandable, that the more horrible a crime, the more people want to learn about it.

To prevent perpetrators of crime and violence from getting rich from their criminal activities, the State of New York has enacted the so-called "Son of Sam" law. This law gets its name, of course, from the killer of six New Yorkers in 1976 and 1977. David Berkowitz, who proclaimed himself to be the "son of a 2,000 year old dog named Sam," received a life sentence upon his conviction for these murders. The fear that he would become wealthy as a result of literary exploitation of his life story prompted the New York legislature to enact the statute which, in effect, "freezes" any such assets until claims against the perpetrators of crimes on behalf of their victims are satisfied.[10] Other States soon followed.[11]

Perpetrators of crime and violence also may suddenly come into money through some sort of "windfall." For example, a criminal might inherit from a relative or perhaps invent something that produces significant income, or he might even win a lottery prize. Admittedly, such occurrences would be the exception rather than the rule; however, since civil judgments against perpetrators usually are not difficult to come by or to renew, the possibility of a windfall should not be overlooked.

To cite a somewhat more realistic example, prisoners tend to be very litigious people. Those who are incarcerated in jails and penitentiaries have little with which to occupy themselves, and have the time, free law libraries, paper, typewriters and just about anything else that they need to file lawsuits against anyone that might feel like suing. Additionally, such organizations as the American Civil Liberties Union (ACLU) have raised and expended hundreds of thousands, perhaps millions, of dollars in time or money for various "prisoners' rights projects." On occasion, a prisoner in confinement may receive monetary awards as a result of one of these cases. For example, one prisoner was awarded $518,000 in a lawsuit involving lack of medical treatment,[12] and two others were awarded $107,000 by a jury for two separate incidents of sexual assault.[13] When a

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9. T. Capote, *In Cold Blood* (Random House, 1965).
10. N.Y. Exec. Law §632-a. *See also* Barrett v. Wojtowicz, 94 Misc. 2d 379, 404 N.Y.S. 2d 829 (1979) (construing Son of Sam law).
11. *See, e.g.*, Ill. Rev. Stat., ch. 70, par. 401 *et seq.* (Criminal Victims' Escrow Account Act).
12. Tucker v. Hutto, No. 78-161-R (E.D. Va. 1978).
13. Doe v. City of Albuquerque, Nos. CV-77-08127, CV-77-08130 (Bernalillo County Dist. Ct. 1979).

prisoner receives a judgment from the Federal government or from a State, county, or city, for alleged mistreatment, the victim should attempt to satisfy his judgment from the proceeds of the prisoner's lawsuit.

While most crime and violence are not committed by the wealthy, not all criminals are jobless. One study actually suggests that very few individuals commit crime because they had lost or could not find jobs.[14] Some individuals work at legitimate jobs *and* criminal endeavors. Certain crimes, particularly sex crimes, very often involve individuals who, aside from their sexual hang-ups, are capable of, and often do, hold normal, well-paying jobs. An individual also may engage in very lucrative criminal activities. Local pimps, gamblers, dope dealers and the like often may have enormous "stashes" of money. The sex offender with a well-paying job interested in maintaining his ties to a community or the criminal with vice activities concerned with Internal Revenue Service scrutiny may well wish to settle a victim's claim.

Although most liability and home owner insurance policies contain specific exclusions for willful acts by an insured person intentionally causing injury to another, coverage may be provided for a victim's claim in some cases. In construing the exclusion, courts have generally, but certainly not always, required that the insured have acted with the specific intent to cause harm to the victim, with the result that the insurer will not be relieved of providing coverage under such an exclusion unless the insured has acted with that specific intent.[15] Under this view it is not sufficient that the insured's intentional, albeit wrongful, act has resulted in unintended harm to a third person; it is the harm itself that must be intended before the exclusion will apply.[16]

Courts have also held that legal insanity on the part of the perpetrator of a crime will negate an "intentional injury exclusion" on the theory that the insured lacked the mental capacity to form the requisite intent. Holdings such as these may be of considerable interest to victims' litigants because the so-called "insanity defense" most often is raised in the same kinds of cases, involving death or serious bodily harm to the victim. Thus, if a well-insured but legally insane perpetrator is involved, collection may be materially facilitated.[17]

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14. *See* W. Raspberry, "Jobless and Criminal?" Washington Post, March 28, 1980, Section A, col. 1.
15. *See generally*, Annot., 2 A.L.R. 3d 1238, 1241 (1965) (regarding liability insurance exclusions for injuries intentionally caused by an insured).
16. *Id.*

Many insurance carriers settle cases regardless of ultimate liability based on the practical costs of defending a case[18] or because of a desire to avoid publicity in a highly controversial case.

Perpetrators Against Victims

As ironic as it might seem, victims of crime and violence are sometimes sued by the perpetrators.[19]

Perpetrators often sue victims for purposes of harassment. From the point of view of perpetrators, there is really no particular reason not to sue their victims. In most instances, the perpetrators sue as paupers and are immune from the imposition of costs if they are unsuccessful; and, because of their poverty, they are practically immune from later tort actions for malicious prosecution or abuse of process.[20] As indigents, unlike other litigants, they approach the courts in a context where they have nothing else to lose and everything to gain.[21] The temptation to file unwarranted suits is obviously stronger in such a situation.

For convicted prisoners with much idle time and free paper, ink, law books, and mailing privileges the temptation to sue a victim is especially strong.[22] And, as noted by United States Supreme Court Justice William H. Rehnquist, "though [an inmate] may be denied legal relief he will nonetheless have obtained a short sabbatical to the nearest . . . court house."[23]

Most trial court judges are sufficiently sophisticated that they know when the legal process is being utilized for spurious purposes. On motion, many such cases are dismissed[24] because a cause of action

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17. *See, e.g.*, Rosa v. Liberty Mutual Ins. Co., 243 F. Supp. 407 (D. Conn. 1965); Arkwright-Boston Mfrs. Mut. Ins. Co. v. Durkel, 363 So. 2d 190 (Fla. Dist. Ct. App. 1978); Aetna Casualty and Surety Co. v. Dichti, 78 Ill. App. 3d 970, 398 N.E.2d 582 (1979); Von Damek v. St. Paul Fire and Marine Ins. Co., 361 So. 2d 283 (La. Ct. App. 1978), *cert. denied*, 362 So. 2d 794 (La. 1978); Ruvolo v. American Casualty Co., 39 N.J. 490, 189 A.2d 204 (1963). *See generally* Annot., 2 A.L.R. 3d 1238 (1965) (regarding liability exclusion for injury intentionally caused by insured).

18. An insurer may be obligated to defend a claim whenever it ascertains facts which give rise to the potential of liability under the policy, although it may ultimately be determined that it has no liability. *See* Gray v. Zurich Insurance Co., 65 Cal. 2d 263, 419 P.2d 168 (1966).

19. For purposes of this discussion, it is assumed that the victim was, in fact, a victim of crime or violence and that the victim reasonably and in good faith believed the suspected perpetrator to be the guilty party. Where there is misuse of legal procedure by a victim, he may and probably should be subject to an action by the accused perpetrator (*e.g.*, malicious prosecution, malicious abuse of process, false arrest, false imprisonment, etc.).

20. Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972).

21. *Id.*

22. *Id.*

23. Cruz v. Beto, 405 U.S. 319, 327, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) (Rehnquist, J., dissenting).

24. *See, e.g.*, Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972); Daves v. Scranton, 66 F.R.D. 5 (E.D. Pa. 1975).

upon which relief can be granted is not alleged[25] or, in *pro se* actions, the court is satisfied that the action is malicious or frivolous.[26] Unfortunately, a reasonably intelligent prisoner with a willingness to misrepresent the facts often can avoid dismissal, although he actually has no chance of eventual success in his suit.[27]

A more troublesome case for the victim is the case where the victim made a mistaken identification of, or charge against, the suspected perpetrator, although in good faith. An innocent party may then have gone to jail, or at least suffered the indignity of an arrest and the rigors of criminal prosecution.

Private citizens are to be encouraged to become interested and involved in bringing the perpetrators of crime to justice and not discouraged under apprehension of fear of recrimination.[28] Therefore, where a good faith, honest mistake as to the identity of a perpetrator is made, courts are not inclined to award damages.[29] Of course, if the identification is made maliciously or in bad faith, the victim may be liable for malicious prosecution or other tort liability.[30]

Nothing can stop the filing of a lawsuit against a victim by a perpetrator or suspected perpetrator of crime. However, the courts are, on public policy grounds, inclined to protect victims from lawsuits brought merely to harass the victim or where victims have acted honestly and in good faith.

Victims Against Third Parties

Victims' rights litigation primarily involves lawsuits by victims against third parties, such as schools or school employees. The reasons for this are twofold. First, if liability can be established against a third party - public or private - the resulting judgment is usually collectable. Second, inherent in the great majority of such lawsuits is a very real *preventive* aspect insofar as future victimization is concerned.

Third-party victim lawsuits primarily involve allegations of negli-

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25. *See* Fed. R. Civ. P. 12(b)(6).
26. *See* 28 U.S.C. §1915(d).
27. Jones v. Bales, 58 F.R.D. 453, 464 (N.D. Ga. 1972).
28. Manis v. Miller, 327 So. 2d 117 (Fla. Dist. Ct. App. 1976).
29. *See, e.g.*, Turner v. Mellon, 41 Cal. 2d 45, 257 P.2d 15 (1953); Manis v. Miller, 327 So. 2d 117 (Fla. Dist. Ct. App. 1976); Shires v. Cobb, 271 Or. 769, 534 P.2d 183 (1975). *See generally* Annot., 66 A.L.R.3d 10 (1975) (regarding liability for instigation or prosecution of person mistakenly identified as person who committed an offense).
30. *Cf.* Armistead v. Escobedo, 488 F.2d 509 (5th Cir. 1974) (liability may arise if the victim does more than merely identify an individual, such as directing the suspect's arrest).

gence or gross negligence. They are based on the theory that the perpetrator was placed in a position to injure the victim through the negligence of a third party; or, that by neglecting to act to prevent a foreseeable crime, the third party caused, or at least facilitated, victimization.

The preventive aspect of third-party litigation has become one of the more interesting and important features of this class of cases, at least from a social point of view. The theory of tort law rests on the view that a defendant has a duty to refrain from certain actions or to take certain actions to prevent criminal injury to the plaintiff; and, if third-party lawsuits by crime victims are successful, then these cases will put other potential defendants, similarly situated, on notice that they too may be held liable. This, in turn, might stimulate potential defendants to conduct themselves in such a manner that future victimization in like cases will be prevented, or at least reduced.[31] The enlightened self-interest of potential defendants may dictate nothing less.

Perhaps this kind of thinking was best summarized by one court in the case which involved the murder of Dr. Michael Halberstam by a master-burglar named Welch.[32] Dr. Halberstam's widow sued Welch for the actual killing and his common-law wife for civil conspiracy leading to the wrongful death of her husband. The court ruled for the plaintiff, and in words that may become prophetic ended its opinion as follows:

> Tort law is not at this juncture, sufficiently well developed or refined to provide answers to all the serious questions of legal responsibility and corrective justice. It has to be worked over to provide answers to questions raised by cases such as this. Precedent, except in the securities area, is largely confined to isolated acts of adolescents in rural society. Yet the implications of tort law in this area as a supplement to the criminal justice process and possibly a deterrent to criminal activity cannot be casually dismissed. We have seen the evolution of tort theory to meet 20th century phenomena in areas such as product liability; there is no reason to believe that it cannot also be adapted to new uses in circumstances of the sort presented here. This case is

31. While the preventive aspects of victims' rights litigation are often important, candor regarding this motivation may limit a damage claim. In one case a jury verdict against a school awarding damages to three students who were assaulted and cut by other students was reduced, in part, because the attorney for the three students had stated before the jury that the case had been brought to prevent future assaults. The award was considered somewhat punitive, not merely compensatory. School Bd. of Palm Beach County, Inc. v. Taylor, 365 So. 2d 1044 (Fla. Dist. Ct. App. 1978).
32. Halberstam v. Hamilton, 705 F.2d 472 (1983).

> obviously only a beginning probe into tort theories as they apply to newly emerging notions of economic justice for victims of crime.[33]

This preventive factor not only extends to the perpetrator, but to third parties as well. A rather graphic illustration in the school setting involves the murder of Natalia Semler.[34] Natalia was murdered at age 14 at the Madeira School in Northern Virginia by a man name John Gilreath. Gilreath had been convicted earlier of abducting and sexually molesting young girls from the same Madeira School. His 20 year sentence on this conviction was suspended by the judge, on the condition that he be confined in a *secure* psychiatric facility and that he not be released to outpatient status without prior order of the court. The psychiatrist in charge of Gilreath, and the probation officer assigned to this very disturbed young man nevertheless at a later date placed him on outpatient status in violation of the court's order. He then proceeded back to the Madeira School and murdered Natalia.

The Semlers were distraught because the crime was so very preventable; all that the people who were responsible for Gilreath's release had to do was to obey the order of the sentencing court, and the killing probably would have never transpired.

In the words of Robert W. Lewis, the Semler's attorney, who successfully argued the case:

> The Semlers were obviously very distressed. They were interested in seeing that this kind of thing didn't happen again. When [the facts of the case] were revealed to them ... it seemed incredible that it should have ever happened in the first place. So a lawsuit was filed in the Federal District Court in Alexandria. It was without a jury. The Semlers interest was not to recover money.[35]

Because of the increase in school crime and violence victims, schools have naturally become common third-party defendants. In the school setting, this category of victims' rights litigation has become the most common.

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33. The development of tort law as it pertains to school crime and violence has been greatly enhanced in California by the adoption of a constitutional right to safe schools. *See* Chapter Two *supra.*

34. Semler v. Psychiatric Institute, 538 F.2d 121 (4th Cir. 1976), *cert. denied sub. nom.*, 429 U.S. 827, 97 S. Ct. 83, 50 L. Ed. 2d 90 (1976).

35. Address of Robert W. Lewis before the annual meeting of the American Bar Association, August 10, 1977, Chicago, Illinois. The full text of his remarks can be found in ABA: Victims of Crime or Victims of Justice, available from the ABA Committee on Victims.

The fact that the Semlers were solely concerned with the preventive impact of the case is demonstrated by their donation of the entire amount of the judgment to a trust fund to provide scholarships for foreign affairs students because this had been Natalia's area of interest.

Chapter VI

Schools as Victims' Rights Litigation Defendants

Schools, whether public or private, are ordinarily "suable."[1] Matters are not quite so simple as this statement might suggest. Third-party lawsuits against schools, particularly public schools, often encounter stringent, sometimes insurmountable, obstacles.

Requirements Prior to Suit

A common requirement prior to bringing suit against a school, particularly a public school, is to serve upon the school a notice that suit may be commenced and the basis for the suit. The notice, which usually must be given well before the statute of limitations would expire, enables the school to investigate the claim at an early stage. While courts often strain to avoid the dismissal of a claim for failure to give notice, failure to substantially comply with the notice requirement typically results in the dismissal of a lawsuit.[2]

Sovereign or Absolute Immunity

At common law "the King could do no wrong," and the same philosophy prevailed as monarchies developed into modern States. States exercising their sovereign powers as well as their subordinate bodies, such as schools, were traditionally held to be absolutely immune from suit.[3] An immunity is a freedom from suit or liability.[4]

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1. J. Rapp, *Education Law* § 12.01[2] (Matthew Bender & Company, Incorporated). State and local procedures should be consulted with regard to procedural aspects of litigation including such matters as pleadings, jurisdiction, venue and service of summons.
2. *See, e.g.*, Scarborough v. Granite School Dist., 531 P.2d 480 (Utah 1975). *See generally* J. Rapp, *Education Law* § 12.01[3] (Matthew Bender & Company, Incorporated).
3. *See generally* J. Rapp, *Education Law* § 12.02[2] (Matthew Bender & Company, Incorporated); W. Keeton, *Prosser and Keeton on The Law of Torts* 1032 *et seq.* (5th Ed. 1984).
   Because the individual sovereign has been replaced, the immunity of States, or their subdivisions, is commonly referred to as governmental immunity. Both terms are in common usage.

There are a number of policy reasons advanced for the doctrine of absolute immunity for the sovereign State including that: 1) fear of lawsuits will "chill" aggressive action by government officials; 2) it is unfair to "second guess" the good faith decisions of government employees; and, 3) it is inappropriate to risk emptying government coffers in satisfying civil judgments. On the other hand, the thought of citizens, injured through the negligence or willful acts of government officials, yet left without a remedy, has also become unpalatable to courts and legislatures.

In 1946, Congress passed the Federal Tort Claims Act[5] which waived sovereign immunity, with certain exceptions, and allowed aggrieved parties to sue the Federal government to the same extent that they would be able to sue another private citizen of the State in which the act took place. After the passage of the Act, a citizen who had been injured through the negligent operation of, say, a Post Office truck, could sue the United States Government to recover his damages.

Among the significant exceptions to the Federal Tort Claims Act's waiver of immunity is for so-called discretionary functions.[6] The exception has resulted in a wide range of varying, often seemingly contradictory, interpretations by the courts. And, it appears that the more the courts attempt to explain the difference between "discretionary" (*i.e.*, immune) acts[7] and "ministerial" acts,[8] for which there is no immunity, the more confusing the area becomes.

The United States Supreme Court grappled with the discretionary-ministerial dichotomy in *Dalehite v. United States*[9] and drew its

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4. W. Keeton. *Keeton and Prosser on The Law of Torts* 1032 (5th Ed. 1984).
5. 60 Stat. 843. As currently in force, *see* 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680.
6. 28 U.S.C. § 2680 provides that the Act does not apply to:

   > Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

7. Examples of cases finding certain school-related activities to be discretionary include:

   Nunn v. State, 35 Cal. 3d 616, 677 P.2d 846, 200 Cal. Rptr. 440 (1984) (determination when firearms test would be given was a discretionary decision).

   Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980) (whether to provide security guards, parking attendants, security gates, and the numbers thereof, are discretionary decisions).

   Cady v. Plymouth-Carver Regional School Dist., 17 Mass. App. 211, 457 N.E.2d 294, 14 Educ. L. R. 1091, *review denied*, 391 Mass. 1103, 461 N.E.2d 1219 (1983) (management of student imbroglios, student discipline, and school decorum fall readily within the discretionary function exception to tort claims act).

8. *See, e.g.*, Baker v. State Bd. of Higher Educ., 531 P.2d 716 (Or. Ct. App. 1975) (maintenance of fairgrounds).
9. 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 2d 1427 (1953).

distinction upon whether the acts complained of were taken at the planning stage (discretionary) or the operational stage (ministerial). The distinction between planning and operational decisions, if workable at all, is at best difficult to apply.[10] What is important to recognize is that at least in some cases courts have decided negligence or duty issues against the victim under the guise of "discretion."[11]

In some contexts, the determination of immunity may additionally or alternatively be based on whether the function undertaken is governmental or proprietary. Immunity then applies to so-called governmental functions, but not those which are proprietary. Unlike governmental functions which can only be or are most appropriately performed by a governmental body, proprietary functions serve private functions. From an empirical standpoint, activities associated with the operation of public schools have, with few exceptions, been held to be governmental functions.[12]

Another exception to government liability under the Federal Tort Claims Act is immunity for: "Any claim arising out of assault and battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[13] This can be important in determining how to plead a victims' rights case. For example, in one case[14] a postal worker, Sullivan, sexually assaulted minor girls. The girls' parents sued under the Federal Tort Claims Act alleging negligence on the part of Sullivan's supervisor in hiring and retaining him because he had been charged with a similar sex offense on a prior occasion, plead guilty to a lesser included offense, and had been ordered to undergo psychiatric treatment. The case was nevertheless dismissed on the grounds that the action arose out of assault and battery, rather than out of negligence in hiring and retention. Hence, the Federal Government could not be held liable.

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10. W. Keeton, *Prosser and Keeton on The Law of Torts* 1041 (5th Ed. 1984).
11. Id. at 1042.
12. J. Rapp, *Education Law* § 12.02[2][c] (Matthew Bender & Company, Incorporated).
    Examples of cases finding certain school-related activites to be governmental include:
    Grames v. King, 332 N.W.2d 615, 10 Educ. L. R. 783 (Mich. 1983) (planning and carrying out of girls' basketball program was a governmental function to which immunity attached).
    Galli v. Kirkeby, 398 Mich. 527, 248 N.W.2d 149 (1976) (in action against board for negligent selection of principal who allegedly made repeated homosexual attacks determined that hiring of employees was a governmental function for which immunity existed).
    Belmont v. Swieter, 114 Mich. App. 692, 319 N.W.2d 386, 4 Educ. L. R. 629 (1982) (operation of a public school is a governmental function and, accordingly, school immune from liability where student was injured when one of his schoolmates hit him in the eye with a chalkboard eraser while in a classroom which was left unsupervised).
13. 28 U.S.C. § 2680(h).
14. Hughes v. United States, 662 F.2d 219 (4th Cir. 1981).

A vast majority of States, like the Federal Government, have abolished or modified sovereign immunity through judicial decision or legislation.[15] One graphic argument favoring this change was made in a case[16] where a high school student in Pittsburgh had been accosted, assaulted and seriously beaten by a group of rowdy youths when he refused their demands for money. The Supreme Court of Pennsylvania found that the school was immune from liability although it was alleged the school realized similar criminal acts had occurred with great frequency in and about the same school and the school had done nothing about it. In a dissent, Justice Michael A. Musmanno stated:

> If the defendant school district had permitted a Bengal tiger to roam the school yard of the Schenley High School, and the minor plaintiff, Louis Husser, Jr., had been mangled by that savage beast, I cannot believe that the Majority of this Court would say that the defendant would not be guilty of neglect in allowing such a peril to life and limb to exist. The responsibility of holding in leash a raging mob of juvenile delinquents intent on ruinous mischief cannot be less.
>
> The school authorities knew of the criminal tidal wave which from time to time inundated the school property. The newspapers, as well as radio and television news programs, frequently referred to this disgraceful victimization of the small and the weak by the big and the brutal, but the authorities initiated no measures to offer protection to the school children. In consequence, Louis Husser suffered a broken jaw, facial paralysis, disfigurement and serious anatomical breakage.[17]

Justice Musmanno went on to argue that such "injustice cannot endure forever" and predicted "that the day will arrive, and it cannot be far off, when people will laugh at solemn decisions of the courts of law which declare that everybody is responsible for his civil wrongs at law, - everybody but the government."[18] Justice Musmanno's prediction did come true in 1973, after his death, when the Supreme Court of Pennsylvania substantially abolished sovereign immunity.[19]

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15. See W. Keeton, *Prosser and Keeton on The Law of Torts* 1044-45 (5th Ed. 1984).
16. Husser v. School Dist. of Pittsburgh, 425 Pa. 249, 228 A.2d 910 (1967).
17. *Id.* 228 A.2d at 911 (Musmanno, J., dissenting).
18. *Id.*
19. Ayala v. Philadelphia Bd. of Educ., 453 Pa. 584, 305 A.2d 877 (1973) (school allegedly negligent in failing to supervise upholstery class resulting in student having arm caught in a shredding machine). No doubt Justice Musmanno would have welcomed the California constitutional right to safe schools.

    Although liability would exist under the California Tort Claims Act, a constitutional right, being

Where abolished by judicial decision, legislatures have typically responded by reinstating immunity to differing degrees.[20] In construing these statutes, it has been stated that "the rule is liability, immunity is the exception."[21] Accordingly: "Unless a legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail."[22] Nevertheless, exceptions to immunity are often narrowly construed.[23]

While it is essential to review the status of sovereign immunity under State law, most States, similar to the Federal Government, have retained immunity for so-called discretionary acts and as to selected torts.[24] Thus, for example, a school may be immune from liability when it uses poor judgment in allowing two students to return to school after being involved in a fracas with another student without taking special precautions to protect the other student; the management of student imbroglios, student discipline, and school decorum often being considered a discretionary function.[25] At least one State, Illinois, has extended further statutory immunity to public schools for all but willful and wanton conduct in the discipline and supervision of students.[26]

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the primary law, would not be subject to immunity or statutorily created defenses. *See* K. Sawyer, *The Right To Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309, 1336-38 (1983).

20. J. Rapp, *Education Law* § 12.02[2][e] (Matthew Bender & Company Incorporated). *See, e.g.*, Setrin v. Glassboro State College, 136 N.J. Super. 329, 346 A.2d 102 (1975) (statutory immunity applies to alleged failure to protect against the criminal propensity of a third person on school premises rather than a physical defect in the premises).
21. Lopez v. Southern California Rapid Transit Dist., 40 Cal. 3d 780 (1985).
22. *Id.*
23. *See, e.g.*, Estate of Garza v. McAllen Indep. School Dist., 613 S.W.2d 526 (Tex. Civ. App. 1981) (school immune from liability where students were stabbed to death or injured by other students on school bus because, although immunity had been waived as to injuries arising from the use of motor vehicles, the incident did not arise from the use of a motor vehicle within the meaning of the waiver).
24. *See generally* Annot., 33 A.L.R.3d 703 (1970) (regarding the modern status of the doctrine of sovereign immunity as applied to public schools and institutions of higher learning).
25. Cady v. Plymouth-Carver Regional School Dist., 17 Mass. App. 211, 457 N.E.2d 294, 14 Educ. L. R. 1091, *review denied*, 391 Mass. 1103, 461 N.E.2d 1219 (1983).

    See also Close v. Voorhees, 67 Pa. Commw. 205, 446 A.2d 728, 4 Educ. L. R. 1185 (1982) (school immune from liability for death of student who was stabbled by another student in a study hall after a supervisor had physically separated the decedent and his attacker who had been arguing and then left room because immunity exception for claims pertaining to the care, custody, and control of real property did not apply).
26. Ill. Rev. Stat., ch. 122, §§ 24-24, 34-85a. *See, e.g.*, Mancha v. Field Museum of Natural History, 5 Ill. App. 3d 699, 283 N.E.2d 899 (1972) (allowing student who was assaulted during field trip to tour museum without supervision did not constitute willful or wanton negligence, if negligent at all, and therefore school was not liable); Gammon v. Edwardsville Community Unit School Dist., 82 Ill. App. 3d 586, 403 N.E.2d 43, 38 Ill. Dec. 28 (1980) (issue of whether school was willfully and wantonly negligent when student injured from a battery inflicted upon a student was matter for jury); Booker v. Chicago Bd. of Educ., 75 Ill. App. 3d 381, 394 N.E.2d 452, 31 Ill. Dec. 250 (1979) (complaint failed to state claim based on willful and wanton conduct where student physically

Official or Qualified Immunity

Another type of immunity, "official" immunity (as distinguished from "sovereign" immunity), arises when public officials are sued as individuals. Public officials generally are not personally liable for acts involving the negligent exercise of discretion. For acts that do not qualify as "discretionary" acts, that is, "ministerial" acts, there is no immunity.[27] Acts that create direct personal risks to others and acts involving ordinary considerations of physical safety are usually considered ministerial where there are no serious governmental concerns.[28]

Official immunity applies only where discretion is exercised in good faith and without malice or improper purpose, or in some instances, by objectively unreasonable conduct.[29] Thus, the immunity is considered qualified.

In addition to whatever immunity is or is not available to an official, there is also a privilege to obey the command of judicial process fair on its face as well as the command of a valid statute.[30] Privilege may apply in other circumstances as well. For example, a school is not liable when an employee takes reasonable protective measures to prevent a mentally incompetent student from committing acts likely to cause serious bodily injury to himself or others.[31]

As in the case of governmental entities themselves, most States have enacted statutes defining the nature and extent tort immunity enjoyed by their employees.[32] A number of States have taken the approach of providing a defense to a suit against an employee or indemnifying or paying any judgment in the event of liability.[33]

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assaulted in rest room by a group of her classmates where their "leader" was appointed rest room monitor by teacher); Clay v. Chicago Bd. of Educ., 22 Ill. App. 3d 437, 318 N.E.2d 153 (1974) (where student was injured by being struck by another student while teacher was absent from classroom, willful and wanton negligence not alleged although other student allegedly had known propensities for violence). *Cf.* Cipolla v. Bloom Township High School Dist., 69 Ill. App. 3d 434, 388 N.E.2d 31, 26 Ill. Dec. 407 (1979) (where student was attacked and beaten as he stood outside the counselor's office on school premises, willful and wanton misconduct was sufficiently alleged).

27. *See* Restatement (Second) of Torts § 895D (1979).
28. W. Keeton, *Prosser and Keeton on The Law of Torts* 1060 (5th Ed. 1984) *See, e.g.*, Baird v. Hosmer, 46 Ohio St. 2d 273, 347 N.E.2d 533 (1976) (gym teacher negligence).
29. *Id. See also* Restatement (Second) of Torts § 895D (1977).
30. *Id.* at 1066.
31. *See* Furrh v. Arizona Bd. of Regents, 139 Ariz. 83, 676 P.2d 1141, 16 Educ. L. R. 631 (1983) (claim for unlawful restraint rejected).
32. *See generally* Annot., 33 A.L.R.3d 703 (1970) (regarding the modern status of the doctrine of sovereign immunity as applied to public schools and institutions of higher learning).
33. W. Keeton, *Prosser and Keeton on The Law of Torts* 1068 (5th Ed. 1984). *See, e.g.*, Horace Mann Insurance Co. v. Independent School Dist., 355 N.W.2d 413, 20 Educ. L. R. 686 (Minn. 1984) (school obligated to defend, but not indemnify, teacher where malfeasance or willful or wanton neglect of duty involved).

Charitable Immunity

Another major type of immunity of importance to private schools is charitable immunity. Numerous theories have been advanced to justify the application of charitable immunity to schools including that: 1) the donations to charitable organizations constitute a trust fund which may not be used for an unintended purpose; 2) since no profits have been derived the charity should not be liable for the acts of its employees; 3) charities are engaged in the performance of governmental or public duties and therefore should be similarly immune; and, 4) it is in violation of public policy to hold charities liable since the overall good is protected by not diverting their money to pay damage claims.[34]

Only a handful of States retain charitable immunity.[35] In some States, efforts have been made to retain the immunity, at least in part, by statute. One State, for example, limits the liability of a charity where a tort is committed in the course of activities to accomplish its charitable purposes.[36] A partial immunity statute may, however, be subject to constitutional attack.[37] Also, even where charitable immunity applies, it may not extend to protect an agent or employee from liability.[38]

Insurance Waiver of Immunity

Where immunity of a school exists, it is often considered waived to the extent of insurance.[39] Few schools rely solely on immunity to protect themselves against liability claims. Moreover, insurance will typically provide for the defense of an action even if immunity is available. Thus, insurance is commonly available in cases against schools. Of course, the insurance must in fact provide coverage.[40]

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34. J. Rapp, *Education Law* § 12.02[2][g] (Matthew Bender & Company Incorporated).
35. *See* Note, *The Doctrine of Charitable Immunity - the Persistant Vigil of Outdated Law*, 4 Baltimore L. Rev. 126, 128 n. 31 (1974); Annot., 38 A.L.R.3d 480 (1971) (regarding immunity of private schools and institutions of higher learning from liability in tort); Annot., 25 A.L.R.4th 513 (1983) (regarding the modern status of tort immunity of nongovernmental charities).
36. *See, e.g.*, Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983) ($20,000 limit).
37. W. Keeton, *Prosser and Keeton on The Law of Torts* 1070-71 (5th Ed. 1984).
38. Restatement (Second) of Agency § 347(1). *See also* Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983).
39. *See, e.g.*, Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980); Horace Mann Insurance Co. v. Independent School Dist., 355 N.W.2d 413, 20 Educ. L. R. 686 (Minn. 1984).
40. *See, e.g.*, Cotton States Mutual Insurance Co. v.Crosby, 244 Ga. 456, 260 S.E.2d 860 (1979) (no coverage under particular liability policy for alleged negligent breach of duty to safeguard school premises resulting in the attack and rape of student in the bathroom of a junior high school, but coverage for alleged unlawful detention of victim after rape).

Chapter VII

Claims for Failure to Protect Against or Prevent Non-Student Crime or Violence

One of the principle features of the "social contract" whereby men and women join together to form a society is the idea that government is in a better position to protect innocent, law-abiding citizens from criminal harm than are individuals who seek personal or familial retribution from wrongdoers. Thomas Jefferson summed up the matter quite succinctly in 1778 when he drafted the Preamble to a proposed Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital, for the Commonwealth of Virginia:

> Whereas it frequently happens that wicked and dissolute men resigning themselves to the dominion of inordinate passions commit violations on the lives, liberty and property of others, and the secure enjoyment of these have principally induced men to enter in to society, government would be defective in its purpose were it not to restrain such criminal acts. . .

Thus, government has assumed a duty to protect the members of society from criminal malefactors or, as Jefferson referred to them, the "wicked and dissolute." To what extent does this expectation of government extend to schools?[1]

Duty-at-Large Rule

An element of all claims raised against schools involving a failure to protect against or prevent non-student crime or violence is a duty, or obligation, requiring schools to protect against or prevent that crime or violence.[2] The general rule in these cases excuses from liability

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1. *See generally* Annot., 1 A.L.R.4th 1100 (1980) (regarding liability of university, college, or other school for failure to protect student from crime).
2. The elements of a tort are 1) a duty, or obligation recognized by law, requiring the actor (*e.g.*, the school) to conform to a certain standard of conduct for the protection of others against unreasonable risks; 2) failure to conform to the standard required; 3) a reasonably close causal connection between

schools, or their officials, on the theory that, while there may be a duty to protect the public *in general*, there is no duty to protect any *specific* individual, absent "special circumstances" or a "special relationship" creating a duty to that particular individual. This rule is often referred to as the duty-at-large rule.

The duty-at-large rule is now firmly rooted in the law of torts. It seems to be grounded more on practical considerations than on principles of legal logic. If we consider the fact that the government, including its agencies such as public schools, has taken upon itself the duty of protecting citizens from criminal depredations, and that, with the rare exception of people making citizens' arrests, the average person has no legal authority or duty to enforce the law, then it would seem logical that government should be held accountable when it fails in this responsibility. On the other hand, since most crime is foreseeable in the general sense, and, indeed, in some urban areas almost seems to be the rule rather than the exception, the burden upon government of calling it to answer every time a crime is committed has been considered intolerable.[3]

The case that is most frequently cited for the duty-at-large rule is *Massengill v. Yuma County*,[4] decided by the Supreme Court of Arizona in 1969. In that case, the estate representatives of two persons who were killed by a drunken driver in an automobile accident alleged that the County of Yuma, its sheriff, and deputy sheriff had been negligent when they failed to protect or prevent the deaths. According to the pleadings, Deputy Keenum was on duty during the late evening of August 8, 1964, in a marked car, equipped with a red dome light, outside two taverns. It was alleged that he knew or should have known that these establishments served alcoholic beverages to minors and were located " . . . along a stretch of dangerous highway which was mountainous, winding and narrow, containing sharp curves and steep hills and was heavily traveled."[5]

Two men, Whaley and Wood, drove separately out of the parking lot in a reckless manner and continued along in a similarly reckless manner, side by side, one on the wrong side of the road, exceeding the

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the conduct and the resulting injury, that is, proximate cause; and, 4) actual loss or damage resulting to the interests of another. W. Keeton, *Prosser and Keeton on The Law of Torts* 164-65 (5th Ed. 1984). Of these elements, the issue of duty is the greatest obstacle and, conversely, the most common defense, to victims' claims.

3. *See* Chavez v. Tolleson Elementary School Dist., 12 Ariz. 472, 595 P.2d 1017 (1979). By its constitutional right to safe schools, California voters may well have determined that the financial burden is tolerable in that State's efforts to curb school crime and violence. *See* Chapter Two *supra*.

4. 104 Ariz. 518, 456 P.2d 376 (1969).

5. *Id.* at 520, 456 P.2d 378.

speed limit and apparently intoxicated. They passed Deputy Keenum, who followed them but made no attempt to stop them until they caused an automobile accident which killed five persons, including those who brought the case. The estate representatives alleged that:

> All of the foregoing violations were committed in the presence of and were obvious and apparent to Keenum, who by virtue of his obligations as deputy sheriff thereupon had the duty to immediately arrest John Whaley and David Wood. Keenum knew or should have known that the driving of John Whaley and David Wood at that time created an extremely dangerous hazard to other motorists on River Road.[6]

The Supreme Court of Arizona ultimately upheld a dismissal of the lawsuit. Although the doctrine of sovereign immunity presented no defense because it had been abrogated in Arizona, the Court recognized that the basic elements of a negligence action must nevertheless be shown. The general rule in cases involving governmental agencies and public officers is that: "If a duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be public, not an individual injury, and must be redressed, if at all, in some form of public prosecution."[7] Accordingly, the obligations of public officers are duties owed to the public at large, and not personally to each and every individual member of the public.[8]

The duty-at-large rule as recognized by the Supreme Court of Arizona became known and followed Nationwide as the *"Massengill* rule."[9] Ironically, the Supreme Court of Arizona in 1982[10] reversed itself and expressly overruled its own *Massengill* rule. The fact that the rule is no longer the law in the State of its origin does not change in the slightest the wide recognition of the rule in States other than Arizona.[11]

Intervening Cause Doctrine

The duty-at-large rule generally applies when a victim sues a govern-

6. *Id.*
7. *Id.* at 521, 456 P.2d 379.
8. *Id.* at 523, 456 P.2d 381.
9. *See, e.g.*, Keane v. Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968) (no duty to protect teacher murdered on public school grounds from criminal acts). *See generally* Annot., 46 A.L.R.3d 1084 (1972) (regarding the liability of a municipality or other governmental unit for a failure to provide police protection).
10. Ryan v. State of Arizona, 134 Ariz. 308, 656 P.2d 597 (1982).
11. *See generally* Restatement (Second) of Torts § 314 (1965).

mental entity or its officials, particularly in law enforcement. The duty-at-large rule has as its analogue in other third-party suits, including schools in some instances, the common law doctrine that, as a general rule, the criminal act of another is a superseding or intervening cause of injury which will shield the actor from liability to third-party victims.[12]

The Restatement (Second) of Torts has summarized the intervening cause doctrine as follows:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.[13]

There are two primary exceptions to this general rule which appear to permit liability to be found even in the absence of a special relationship between the actor and the third-party victim. The first exception is:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless* the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime. (Emphasis added.)[14]

Very simply, if the likelihood of injury to an individual is such that the defendant knew or should have known that it might take place, that is, it was foreseeable, then he must act in a non-negligent manner.[15] Whether the likelihood of injury is foreseeable often determines liability.

A second exception established by the Restatement is:

> If the likelihood that a third person may act in a particular

12. Independent School Dist. v. AMPRO Corporation, 361 N.W.2d 138, 22 Educ. L. R. 918 (Minn. Ct. App. 1985).
13. Restatement (Second) of Torts § 315 (1965).
14. Restatement (Second) of Torts § 448 (1965).
15. *See also* Restatement (Second) of Torts § 302B which provides:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

> manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortuous, or criminal does not prevent the actor from being liable for harm caused thereby.[16]

This rationale appears somewhat circular on its face; however, it makes sense when it is interpreted to postulate the theory that some acts are taken for the precise purpose of preventing or attempting to prevent certain foreseeable criminal activity by third parties. If these acts are omitted or performed in a negligent manner then liability will attach. To illustrate, locks are provided for doors because of the likelihood that criminally inclined persons will be more deterred from attempting to force a locked door than he would be from simply stepping through an unlocked door or window. Hence, if there is no lock or the lock is defective, culpable negligence arises from the failure to perform adequately an act - furnishing of secure doors and windows - the purpose of which was to prevent foreseeable crime.[17]

The intervening cause doctrine, like the duty-at-large rule, typically is raised as a defense in victims' rights litigation. In general, it will serve as a defense unless: 1) the school is under a duty to the victim, because of some relation between them, to protect him against the crime;[18] 2) where the school has undertaken the obligation of doing so; or, 3) the school's conduct has created or increased the risk of harm through the crime.[19]

Failure to Protect or Prevent Cases in the School Setting

Almost every failure-to-protect case in the school setting involves a common legal scenario: 1) the victim alleges that, in the circumstances of the case, the school had a duty to protect against or prevent

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16. Restatement (Second) of Torts § 449 (1965).
17. In the final analysis the positions taken by the Restatement, at least insofar as the exceptions to the intervening cause doctrine are concerned, are basically common sense rules. What third-party victims' rights litigation boils down to was summarized by a writer in the context of third party practice involving contribution and indemnity (in Illinois):

    > Historically, third party practice in Illinois can best be described as an effort by courts and attorneys to place ultimate liability in whole or in part for a loss where logic suggests such liability may really belong. Generally, this will be against the more negligent party or parties in appropriate proportions or against the party who by agreement undertook to assume the risk of such loss. J. Kissel, *Development In Third Party Practice - Contribution and Indemnity*, 71 Ill. B. J. 654 (1983).

    Extrapolating these principles to third-party victims rights cases, it is considered by many to be "logical" to transmit some or all of the loss to those third parties who were best in a position to protect against or prevent the injury. This is particularly true given the fact that the real cause of harm in victims cases, the criminal himself, will usually be insolvent.
18. The duty may arise may arise from a constitutional right to safe schools, as in California, common law tort law, or otherwise. *See* Chapter Two *supra*.
19. *See* Restatement (Second) of Torts § 449 comment a (1965).

crime and that this duty was breached, proximately causing injury or death to the victim; 2) the defense counters with the duty-at-large rule or the intervening cause doctrine; 3) the victim then asserts that an exception to the duty-at-large rule or intervening cause doctrine exists, such as a special relationship between the school and the victim. Where applicable, arguments are sculpted to either assert or avoid immunity doctrines.[20]

Victims' rights litigation in the school setting can be complicated by the fact that schools are often a microcosm of a community. The relationship between the school and a victim may not, for example, simply be equated to the relationship between a lessor and lessee or any other single legal relationship. Rather, a school at the primary, secondary or post-secondary level may have varying relationships with different victims, or even the same victim. In addition to whatever general student-school relationship may exist,[21] relationships may be legally analogous to those of parent-child (teacher-student or *in loco parentis*), master-servant (school-student employee or work study student), lessor-lessee (school-student dormitory resident), innkeeper-guest (school-temporary occupant of housing or student union hotel), landowner-occupier (school-trespasser, licensee or invitee), governmental body-citizen (public school-student or third party), security force-invitee, licensee or trespasser (school security force-student or third party),[22] and common carrier-passenger (school transportation service-student, among others. The nature of the relationship will often define the rights and obligations of the parties in victims' rights litigation. However, it can be said that a school's responsibility to protect students generally will be somewhat greater for younger, handicapped or immature students as compared with older, healthy students.

Against this general background, cases involving the liability of schools for non-student crime or violence fall into two categories.[23] The categories include: 1) failure to protect against criminal activity

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20. The existence of a constitutional right to safe schools, as in California, will likely diminish the viability of the duty-at-large or intervening cause defenses, or constitute a specific exception to them. *See* Chapter Two *supra*. This right should also avoid claims of immunity. *See* Chapter Six *supra*.
21. *See generally* J. Rapp, *Education Law* § 8.01 (Matthew Bender & Company Incorporated) (regarding various theories of the student-school relationship).
22. *See generally* D. Berman, *Law and Order on Campus: An Analysis of the Role and Problems of the Security Police*, 49 J. of Urban Law 513 (1971-72). *See also* Jones v. Wittenberg University, 534 F.2d 1203 (6th Cir. 1976) (security guard and university liable when fleeing student was negligently shot and killed).
23. There may also be some overlap with cases involving student initiated crime and violence. *See* Chapter Eight *infra*.

generally; and, 2) failure to protect against specific foreseeable criminal activity.

Failure to Protect Against Criminal Activity Generally

Tolleson Elementary School had been in fall session for only one week. Shortly after school began one day, a puppy walked through the open door of the fifth grade classroom and down the aisle, causing the pupils to whisper and giggle. The teacher inquired if the dog belonged to anyone in the class. Several children raised their hands, including, ten year old Regina Chavez, who told the teacher that the dog belonged to a neighbor. Regina asked if she could take the puppy home. Regina was sent to the principal's office with the dog to get permission. Permission was not given and Regina was told to return to her classroom. Regina did not argue, left with the dog and was subsequently observed leaving by a custodian, a student and a passerby. Regina disappeared. The only other evidence of disappearance was a tape-recorded statement of her abductor, John Cuffle, who was convicted and sentenced for murder. Cuffle abducted Regina outside the school grounds, took her to a field a few miles from the school and killed her. Her body was found some three months later.[24]

The death of Regina Chavez was tragic. No doubt, some of those who saw her before her disappearance have wondered: "If only I had . . . . " But as tragic as her death was, can a school be held liable for her death?

Advocates for victims argue that we live in a ferociously crime-ridden society in which violence at the hands of individuals or mobs occurs almost on a random basis with no prior warning. Because crime in general is so likely, it must be foreseen and either prevented or individuals, such as Regina Chavez, protected from it. This "crime-at-large" theory may be flanked, as it was in the *Chavez* case, by the claim that the school or other defendant had a general obligation to supervise the victim[25] or perpetrator.[26]

The Court in *Chavez*, as well as courts generally,[27] reject the crime-

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24. *See* Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017 (1979) (affirming a decision of then Superior Court Judge Sandra Day O'Connor to grant defendants' motion for a judgment notwithstanding the verdict after a jury had awarded $400,000 to Regina's father).
25. Under Arizona law, as in most States, a school is required to provide for adequate supervision over its students. This duty is breached when conduct falls below the standard of ordinary care by creating an unreasonable risk of harm.
26. *See, e.g.*, Naisbitt v. United States, 611 F.2d 1350 (10th Cir. 1980), *cert. denied*, 449 U.S. 885, 101 S. Ct. 239, 66 L. Ed. 2d 111 (1980) (the United States is not liable under the Federal Tort Claims Act for failing to supervise off-duty airmen who murdered an individual).
27. *See also* Keane v. Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968) (no duty on the part of city or

at-large theory, typically relying on the duty- at-large rule or the intervening cause doctrine. Where there are no facts indicating that school personnel should have been aware of the potential of criminal conduct in the area of the school, a school will not be liable for criminal conduct which may occur although perhaps negligent by creating a situation which afforded an opportunity to a third person to commit a crime.[28] To make a school liable for unforeseeable criminal conduct is untenable. Indeed, "[i]f it were otherwise, prevision would become paranoia and the routines of daily life would be burdened by intolerable fear and inaction."[29] Similarly, it was held in a case involving the murder of a public school teacher on school grounds by one of her students, that the duty of law enforcement agencies to protect such a teacher from criminal acts is no more than the general duty owed to all citizens to protect the safety and well- being of the public at large.[30]

A minority of courts have rejected the duty-at-large rule. In *Ryan v. State of Arizona*,[31] the Supreme Court of Arizona expressly rejected the duty-at-large rule which it had originated in the *Massengill* case and held that victims could sue government officials for failure to protect.

The *Ryan* case involved the escape from custody of a 17 year old inmate, John Myers, who had been held at the Arizona Youth Center. After his escape, Myers robbed a convenience store and shot the plaintiff, David Ryan, at point-blank range with a sawed-off shotgun causing him serious and permanent injury. Ryan sued the State and individual correctional officials for gross negligence in the supervision of Myers who had a long history of criminal behavior and three previous escapes from the Department of Corrections.

The Supreme Court of Arizona ultimately recognized that the "horribles" sought to be prevented by the duty-at-large rule were not warranted. Insurance coverage, which is readily available, could reduce the potential financial burden, as it does in almost every other

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its police force to prevent the killing of a school teacher on school property); Hall v. Board of Supervisors Southern University, 405 So. 2d 1125, 1 Educ. L. R. 468 (La. Ct. App. 1981) (no liability when non-student shot student as she awaited an elevator); Setrin v. Glassboro State College, 136 N.J. Super. 329, 346 A.2d 102 (1975) (no liability for stab wounds incurred during a riot at a basketball game on a State college campus; third party action was an intervening cause).

28. Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017 (1979); Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980); Joner v. Board of Educ., 496 A.2d 1288, 27 Educ. L. R. 203 (Pa. Commw. 1985). *See also* Restatement (Second) of Torts § 448 (1977); 62 Am. Jur. 2d, *Premises Liability*, § 200 (1972).

29. Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017 (1979).

30. Keane v. Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968).

31. 134 Ariz. 308, 656 P.2d 597 (1982).

situation in which State liability is possible (or even probable); and, government officials should have no fear to act because under State law they were already immune from personal liability. Therefore, the Court concluded that governmental immunity should be available as a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy. Otherwise, the State and its agents should be subject to the same tort laws as private parties.[32]

Failure to Protect Against or Prevent Specific Foreseeable Criminal Activity

Madelyn Miller, a 19 year old junior at the State University of New York (SUNY) at Stony Brook, was confronted at her dormitory's laundry room at approximately 6:00 a.m., by a man wielding a large butcher knife. She was blindfolded and prodded out of the room, through an unlocked outer door from the basement, back in another unlocked entrance to the dormitory, up some stairs to the third floor and into a dormitory room. She was raped twice at knife point and threatened with mutilation and death if she made any noise. Her assailant, who was never identified, finally led her out to the parking lot where he abandoned her.[33]

Strangers were not uncommon at the time in the dormitory hallways at SUNY, and there had been reports to campus security of men being present in the women's bathroom. Miller had herself twice complained to the dormitory manager about nonresidents loitering in the dormitory lounges and hallways when they were not accompanied by resident students. The school newspaper had published accounts of numerous crimes in the dormitories such as armed robbery, burglaries, criminal trespass, and a rape by a non-student. Notwithstanding these reports, the doors at all of the approximately ten entrances to the dormitory building were kept unlocked at all hours, although each contained a locking mechanism.[34]

To avoid the duty-at-large rule or the intervening cause doctrine, "special circumstances" or a "special relationship" creating a duty to the victim must be established.[35] Although a school is usually not

32. *Id.* 656 P.2d at 600.

33. Miller v. State of New York, 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829, 19 Educ. L. R. 618 (1984). On remand, the award in this case was fixed at $400,000. *See* Miller v. State of New York, 487 N.Y.S.2d 115, 23 Educ. L. R. 1021 (N.Y. App. Div. 1985).

34. *Id.*

35. Again, the existence of a constitutional right to safe schools, as in California, will likely diminish the viability of the duty-at-large or intervening cause defenses, or constitute a specific exception to them. *See* Chapter Two *supra*.

liable for some "generalized danger," it may be liable for injuries to its dormitory residents - the equivalent of a lessor-lessee or landlord-tenant relationship.[36] Thus, in the case of Madelyn Miller, SUNY was obligated to maintain its property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[37] Under this standard, a school as "a landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants."[38] Specifically, SUNY "had a duty to take the rather minimal security measure of keeping the dormitory doors locked when it had notice of the likelihood of criminal intrusion."[39] The landlord-tenant relationship has been a common argument raised when dormitory residents seek damages from a school after being victimized.[40]

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36. The landlord-tenant relationship generally does not, in and of itself, impose a duty upon the landlord to protect his tenants against criminal conduct of third persons. A landlord must recognize and assume the duty to protect its tenants from foreseeable criminal conduct. *See, e.g.*, Cutler v. Board of Regents, 459 So. 2d 413, 21 Educ. L. R. 1071 (Fla. Dist. Ct. App. 1984). *See generally* 43 A.L.R.3d 331 (1972) (regarding landlord's obligation to protect tenant against criminal activites of third persons).

In making housing or dormitory contracts with students, schools often utilize "license" agreements, rather than "lease" agreements. Designation of a student as a licensee rather than a lessee or tenant has been upheld for some purposes, such as tenant eviction, but generally has not be upheld for tort liability purposes. *See* Duarte v. State of California, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979) (depublished by the Supreme Court of California).

Probably the single most important case favorable to plaintiffs in victim v. landlord lawsuits is *Kline v. 1500 Massachusetts Avenue*, 141 App. D.C. 370, 439 F.2d 477 (D.C. Cir. 1970), in which liability was imposed where residents were assaulted in common hallways.

Other relationships have not given rise to an obligation to protect. *See, e.g.*, Vitale v. City of New York, 60 N.Y.2d 861, 458 N.E.2d 817, 470 N.Y.S.2d 358, 15 Educ. L. R. 515 (1983) (special relationship not established where school adopted detailed security plan, which it failed to enforce, by fact that teacher had a role to play in the implementation of the plan); Corcoran v. Community School Dist., 494 N.Y.S.2d 747, 28 Educ. L. R. 554 (N.Y. App. Div. 1985) (where teacher was attacked as she reentered school premises after lunch, no special relationship created by employment of additional security guards absent evidence that they were employed specifically to protect the teacher or a limited class of teachers of which she was a member).

Still other relationships have. *See, e.g.*, Lopez v. Southern California Rapid Transit Dist., 40 Cal. 3d 780 (1985) (bus passenger).

37. Miller v. State of New York, 62 N.Y. 2d 506, 513, 467 N.E.2d 493, 478 N.Y.S.2d 829, 19 Educ. L. R. 618 (1984) (citing cases).

38. *Id.*

39. *Id.* 62 N.Y.2d at 514. The Court did not decide whether SUNY similarly would be liable for a failure to keep all dormitory doors locked at all times. *Id.* 62 N.Y.2d at 514-15 (Kaye, J., concurring). *See also* Schultz v. Gould Academy, 332 A.2d 368 (Me. 1975) (where 16 year old student was criminally assaulted by an unidentified intruder, negligence issue presented where school watchman became aware of male intruder in girls' dormitory when he saw footprints leading up to, but not away from, building).

40. Other arguments may be raised to flank the landlord-tenant relationship including claims of breach of warranty of habitability, misrepresentation of a dormitory as safe and secure, and breach of an express contract to protect. *See* Cutler v. Board of Regents, 459 So. 2d 413, 21 Educ. L. R. 1071 (Fla. Dist. Ct. App. 1984).

The Supreme Court of Massachusetts in *Mullins v. Pine Manor College*[41] similarly found "that colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties."[42] As in the Madelyn Miller case, *Mullins* involved the rape of dormitory resident.[43] In addition to relying on the general expectation of students that they will be protected from foreseeable harm, the Court also recognized that the College had voluntarily assumed, in consideration of tuition or dormitory fees, a duty to provide their students with protection from the criminal acts of third parties.[44]

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41. 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983).

42. *Id.* 449 N.E.2d at 335.

The Court in *Mullins* continued:

> This consensus stems from the nature of the situation. The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students. No student has the ability to design and implement a security system, hire and supervise security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visiters . . . . Resident students typically live in a particular room for a mere nine months and, as a consequence, lack the incentive and capacity to take corrective measures. College regulations may also bar the installation of additional locks or chains. Some students may not have been exposed previously to living in a residence hall or in a metropolitan area and may not be fully conscious of the dangers that are present. [Footnote deleted.] Thus, the college must take the responsibility on itself if anything is to be done at all . . . .
>
> Of course, changes in college life, reflected in the general decline of the theory that a college stands in loco parentis to its students, arguably cut against this view. [Footnote deleted.] The fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm. *Id.* 449 N.E.2d at 335-36.

43. Pine Manor College is a four year college for women. The College had taken various security measures, including surrounding much of the campus with a six foot high chain link fence, use of security guards to admit and register visitors during certain hours, use of visitor escorts, and the stationing of a guard at an observation post. Another guard was assigned to patrol the campus. He was responsible for making rounds to the dormitory areas every 15 to 30 minutes to check the doors and gates to see that they were locked. Pine Manor College was located in an area with relatively few reports of violent crime, although a dormitory building had been burglarized a year before the incident and the evening before a young man scaled the outer fence around the campus.

    Lisa Mullins had returned to her dormitory at approximately 3:00 o'clock a.m. with two friends. They entered through an exterior gate which was unlocked. After visiting with friends, she returned to her room, locked her door and went to sleep. Between 4:00 and 4:30 o'clock a.m., she was awakened by an intruder. He ultimately led her out of the building and across an outside courtyard. They left the courtyard by proceeding under the chains of one of the exterior gates which was not secured tightly. They walked down a bicycle path toward the refectory, the College's dining hall. After marching about in front of the refectory, they entered the refectory through an unlocked door and spent several minutes inside. They proceeded out of the refectory and marched around in front. They then went back inside, and the assailant raped her. The entire incident lasted 60 to 90 minutes, and they were outside on the campus for at least 20 minutes.

44. According to the Court: "Adequate security is an indispensable part of the bundle of services which colleges, and Pine Manor, afford their students." Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 336, 11 Educ. L. R. 595 (1983).

Students, in turn, rely on this undertaking.[45] Having been negligent in protecting Lisa Mullins, the College was liable for damages.[46]

As a possessor of land, a school may incur liability other than as a landlord. Traditionally, those occupying or using land other than as tenants have been categorized as trespassers, licensees and invitees.[47] The rights and obligations of the parties vary based on the characterization given the occupant, with the least care due a trespasser and the greatest care due an invitee.

A trespasser is a person who enters or remains upon land without consent.[48] With some exceptions,[49] a school is not liable for injury to trespassers caused by its failure to exercise reasonable care to put its land in a safe condition for them, or to carry on its activities in a manner which does not endanger them.[50]

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45. The Court noted:

> . . . [I]t is quite clear that students and their parents rely on colleges to exercise care to safeguard the well- being of students. When students are considering enrolling in a particular college, they are likely to weigh a number of factors. But a threshold matter is whether the college has undertaken to provide an adequate level of security. Thus, prospective students and their parents who visit a college are certain to note the presence of a fence around the campus, the existence of security guards, and any other visible steps taken to ensure the safety of students. They may inquire as to what other measures the college has taken. If the college's response is unsatisfactory, students may choose to enroll elsewhere. Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 336, 11 Educ. L. R. 595 (1983).

46. The Court pointed out the following deficiencies in the College's security system could have warranted the verdict against the College:

> An observation post near the main entrance is situated at such a distance from the fence that an intruder could climb over the fence without being detected by the guard on duty. The exterior gates leading into the courtyards were not difficult to scale or to open. The walls surrounding the courtyards were too low to be adequately protective. The college used a single key system whereby the same key would open the door to the commons building, the door to the dormitory, and the door to the individual room. Only two security guards were on duty at any time. No system was utilized to ensure that the guards were performing their patrols around the campus. The locks on the doors to the dormitory and the individual rooms were easy to pick, and neither deadbolts nor chains were used. The jury also could have credited the opinion of the plaintiff's expert that the security provided by Pine Manor was inadequate to protect a student in the position of the plaintiff. Additionally, there was evidence that after the evening of the attack, the college hired two additional guards to patrol the villages [dormitories] from 11:30 p.m. to 7:30 a.m. and installed chains on the interior side of the doors to individual rooms. [Footnote deleted.] There was also ample evidence that the guards failed to perform their duties both prior to the attack and on the evening of the attack. There was evidence that the locks to the individual rooms could be opened with a credit card. There was also evidence that the door to Mullins's dormitory lacked a knife guard which the defendants' expert witness indicated should have been present. Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 338, 11 Educ. L. R. 595 (1983).

47. A minority of States have abolished distinctions based upon the entrant's status as a trespasser, licensee or invitee, typically imposing ordinary negligence principles of foreseeable risk and reasonable care. Greater care is thus due trespassers and licensees than generally exists. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976). *See generally* W. Keeton, *Prosser and Keeton on The Law of Torts* 432-34 (5th Ed. 1984).

48. *See* Restatement (Second) of Torts § 329 (1965).

49. A primary exception pertains to trespassing children. For example, under the so-called "attractive

A licensee is a person who is privileged to enter or remain on land by virtue of the possessor's consent.[51] In the school setting, licensees would include persons allowed to come upon land for their own purposes rather than the school's, such as those conducting[52] or attending[53] a meeting in which the school has no interest held in facilities gratuitously provided. A school is generally not liable for harm caused to licensees by its failure to carry on its activities with reasonable care for their safety unless: 1) it should expect that they would not discover or realize the danger; and, 2) they do not know or have reason to know of the possessor's activities and the risk involved.[54]

Invitees are of two types: Public invitee and business visitor. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public,[55] such as a person attending a class reunion.[56] A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with the business dealings of the possessor of the land,[57] such as a patron of a college[58] or an employee of an independent school food service operator.[59] A school is subject to liability to its invitees for physical harm caused to them by its failure to carry on its activities with reasonable care for their safety if it should expect that they will not discover or realize the danger, or will fail to protect themselves against it.[60] Thus, a school is under an affirmative duty to protect invitees not only against dangers of which it is aware, but also against those which with reasonable care it might discover.[61] Students have often been characterized as invitees for purposes of victims' rights litigation.[62]

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nuisance" doctrine, the possessor of land may be subject to liability for physical harm to children trespassing thereon caused by certain artificial conditions. Restatement (Second) of Torts § 339 (1965).

50. W. Keeton, *Prosser and Keeton on The Law of Torts* 393-94 (5th Ed. 1984).
51. Restatement (Second) of Torts § 330 (1965).
52. Britt v. Allen County Community Junior College, 230 Kan. 502, 638 P.2d 914 (1982).
53. Smith v. Board of Educ., 204 Kan. 580, 464 P.2d 571 (1970).
54. *See* Restatement (Second) of Torts § 341 (1965).
55. Restatement (Second) of Torts § 332 (1965).
56. Guilford v. Yale University, 128 Conn. 449, 23 A.2d 917 (1942).
57. Restatement (Second) of Torts § 332 (1965).
58. Jay v. Walla Walla College, 53 Wash. 2d 590, 335 P.2d 458 (1959).
59. Aarhus v. Wake Forest Univ., 291 S.E.2d 837, 4 Educ. L. R. 887 (N.C. Ct. App. 1982).
60. Restatement (Second) of Torts § 341 A (1965).
61. W. Keeton, *Prosser and Keeton on The Law of Torts* 419 (5th Ed. 1984).
62. *See, e.g.*, Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980); Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842, 19 Educ. L. R. 689 (1984); Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980); Schultz v. Gould Academy, 332 A.2d 368 (Me. 1975).

Where a victim can establish his status as an invitee, a school may be liable for injuries sustained from foreseeable crime. In *Peterson v. San Francisco Community College District*,[63] for example, the Supreme Court of California considered the liability of the City College of San Francisco for injuries sustained by Kathleen Peterson as a result of an attempted daylight rape while she was ascending a stairway in the school's parking lot. An unidentified male jumped from behind "unreasonably thick and untrimmed foliage and trees" which adjoined the stairway and attempted to rape her. The assailant used a *modus operandi* which was similar to that used in previous attacks on the same stairway. The College and other defendants were aware that other assaults of a similar nature had occurred in that area and had taken steps to protect students who used the parking lot and stairway. It had not, however, publicized the prior incidents or in any way issue warning of the danger of attack in the area. Ms. Peterson had paid a fee for a parking permit to use the parking lot.

The Court recognized that an enrolled student using a parking lot in exchange for a fee is an invitee to whom the possessor of premises would ordinarily owe a duty of due care. As the College was in a superior position to its students "to know about the incidences of crime and to protect against any recurrences," it was obligated "to exercise reasonable care to keep the campus free from conditions which increase the risk of crime" or warn students by "alerting them to unknown dangers and encouraging them to exercise more caution."[64]

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63. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842, 19 Educ. L. R. 689 (1984).

64. *Id.* The Court cited *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970), and observed that "in some instances the relationship of a school district to its student gives rise to a duty of care." *Id.* 685 P.2d 1196 n. 3. This suggests an even greater duty of care would exist at a primary and secondary level of education.

The Court distinguished the case of *Hayes v. State of California*, 11 Cal. 3d 469, 521 P.2d 855, 113 Cal. Rptr. 599 (1974), in which two considerations weighed against holding a university liable for attacks upon two young men who were using the university's beach at night. Those considerations were, first, that the public was well aware of the incidence of violent crime, particularly in unlit and little used places, and second, to the extent that warnings of criminal conduct might serve a beneficial purpose, it - unlike cautioning against a specific hazard in the use of property - admonishes against any use of the property whatever, thus effectively closing the area, a matter better left to legislative and administrative bodies, rather than the judiciary.

In *Peterson* the Court noted that:

> While these factors may have been appropriate considerations in the context of *Hayes* they are inapplicable here. In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime. Here the parking lot was not one of the "unlit and little used places" to which we referred in *Hayes*. Plaintiff was lawfully on the campus and was attacked in broad daylight in a place where school officials knew she and others as well as the assailant might be. Further, the warnings sought here would not result in

Other cases have also considered the liability of schools for injuries sustained by trespassers, licensees and invitees as a result of crime.[65] Liability has been found in some cases,[66] but not others.[67] Foreseeability of crime and violence is typically essential to finding liability. Foreseeability is often based on prior incidents of crime and violence of a similar nature which are not too remote in time.[68]

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preventing the students from using the campus or its facilities, only in alerting them to unknown dangers and encouraging them to exercise more caution.

An examination of the policies discussed in . . . [previous] cases compels the conclusion that the defendants did in fact owe the plaintiff a duty of care. First, the allegations, if proved, suggest that harm to the plaintiff was clearly foreseeable. In light of the alleged prior similar incidents in the same area, the defendants were on notice that any woman who might use the stairs or the parking lot would be a potential target. Secondly, it is undisputed that plaintiff suffered injury. Third, given that the defendants were in control of the premises and that they were aware of the prior assaults, it is clear that failure to apprise students of those incidents, to trim the foliage, or to take other protective measures closely connects the defendants' conduct with plaintiff's injury. These factors, if established [upon trial], also indicate that there is moral blame attached to the defendants' failure to take steps to avert the foreseeable harm. Imposing a duty under these circumstances also furthers the policy of preventing future harm. Finally, the duty here does not place an intolerable burden on the defendants.

. . . As a community college district responsible for overseeing the campus, the defendant and its agents are in a superior position to know about the incidences of crime and to protect against any recurrences. *Id.* 685 P.2d 1201-02.

In *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), the Court abolished the distinction among the respective duties owed to trespassers, licensees and invitees. Other courts would likely distinguish *Hayes* and *Peterson* by stating the the victims in *Hayes* were licensees, while the victim in *Peterson* was an invitee.

65. Cases often involve rape. More than any other area of victims' rights litigation in the school setting, the issue of rape on campus has created the most interest among legal commentators. *See* N. Hauserman and P. Lansing, *Rape on Campus: Postsecondary Institutions as Third Party Defendants*, 8 J. Coll. & U. L. 182 (1981); M. Nolte, *Rape on Campus: When is the Landlord Liable?*, 25 Educ. L. R. 997 (1985).

66. *See, e.g.*, Stockwell v. Board of Trustees, 148 P.2d 405 (Cal. Ct. App. 1944) (student loss of eye after begin struck by shot from BB gun discharged by an unknown boy; whether university negligently permitted use of grounds by boys using BB guns although campus was a game refuge was a matter for jury).

See also Duarte v. State of California, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979) (school liable where student raped and murdered in dormitory; school had knowledge of chronic pattern of violent attacks, rapes, and violence directed toward female students). The Supreme Court of California subsequently directed that the *Duarte* opinion not be published in the official California case reporter. Thus, the precedential value of *Duarte* Nationwide is diminished and in California is essentially eliminated. *See* Baldwin v. Zoradi, 123 Cal. App. 3d 275, 294, 176 Cal. Rptr. 809 (1981). The opinion nevertheless provides an example of the approach which has been taken by a court in victims' rights cases.

67. *See, e.g.* Hayes v. State of California, 11 Cal. 3d 469, 521 P.2d 855, 113 Cal. Rptr. 599 (1974) (in action where one person was seriously injured and another died as a result of an attack by unknown persons while asleep in the night on a beach of the campus of the University of California, held no duty to warn against criminal conduct where public was aware of incidence of violent crime and no liability unless a dangerous condition on the property itself contributed to the assaults); Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980) (school's insurer not liable for murder of students who were abducted as they proceeded to their car parked near a school building's entrance where neither actual nor constructive knowledge of prior, similar criminal acts, committed upon invitees is established).

68. *See* Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980) (minor larcenies from automobiles and school buildings, hit and run complaints for minor automobile damage, and miscellaneous

If a party is unable to establish the status of invitee, licensee or even trespasser, no duty whatsoever will arise. Where a non-student walking on a sidewalk adjacent to a school was foreceably taken through an unsecured gate to the school grounds, beaten and sexually assaulted, the school will not be liable because the passerby was neither invited nor permitted on school property.[69]

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incidents such as malicious mischief will not give notice of a possibility of murder); School Bd. of Palm Beach County v. Anderson, 411 So. 2d 940, 3 Educ. L. R. 797 (Fla. Dist. Ct. App. 1982) (history of racial incidents, including fights and riots, was sufficient to present jury question in case where student was shot to death); Gallagher v. City of New York, 30 A.D.2d 688, 292 N.Y.S.2d 139 (1968) (evidence of pushing incident which occurred 20 months previously and of another incident involving a student being slightly scratched on the cheek by a knife wielded by another student 4 months previously may not be considered in case involving rape of 13 year old student as she proceeded on an errand at her teacher's request).

69. Joner v. Board of Educ., 496 A.2d 1288, 27 Educ. L. R. 203 (Pa. Commw. 1985) (isolated criminal act was not foreseeable use of school property or likely injury resulting from unsecured gate).

Chapter VIII

Claims for Failure to Protect Against or Prevent Student Crime or Violence

Just as the "social contract" establishing society presumes that government is in the best position to protect against or prevent crime or violence, so too do students and their parents look to schools to fulfill these obligations with regard to crime or violence caused by students in our Nation's schools. Although the applicable rules are substantially the same as for non-student crime or violence, the existence of the student-school relationship clearly enhances the possibility of a school being liable where immunity does not exist.[1]

Student-School Relationship

Numerous theories of the student-school relationship have been suggested.[2] The traditional theory advanced was that a school acted *in loco parentis* for the student, that is, in the place of a parent and with all a parent's rights, duties and responsibilities.[3] The doctrine holds that schools have a responsibility to protect students from harmful and dangerous influences,[4] and to maintain order so that teaching may be accomplished in an atmosphere conducive to education.[5]

For many years the *in loco parentis* theory has been eroding and is now almost universally discounted as giving rise to a legal duty of protection.[6] In the widely reported case of *New Jersey v. T.L.O.*,[7]

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1. *See* Chapter Six *supra* (regarding immunities).
2. *See generally* J. Rapp, *Education Law* § 8.01 (Matthew Bender & Company, Incorporated).
3. *See* 1 W. Blackstone, Commentaries, Chapter 16.
4. *See* Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (App. Term 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).
5. *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal.Rptr. 220 (1969).
6. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 962-63, 25 Educ. L. R. 876 (1985) (citing cases).
7. 469 U.S. ___, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985).

involving the standard to be applied to student searches, the United States Supreme Court said that the *in loco parentis* theory of the student-school relationship is "in tension with contemporary reality." In an earlier case involving use of corporal punishment, the Supreme Court also recognized that "the concept of parental delegation" as a source of school authority is simply not "consonant with compulsory education laws."[8] According to the Supreme Court: "Today's public schools do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."[9] At the post-secondary education level as well, the *in loco parentis* theory has given way to the right of students to define and regulate their own lives.[10]

With the erosion of the *in loco parentis* theory of the student-school relationship, other theories have generally not been descriptive of the obligations of a school to protect against or prevent student crime or violence.[11] Rather courts have typically resorted to other legal relationships, such landowner-invitee, to determine rights and obligations of the student and school.[12] Thus, the standard of care imposed upon a school in the performance of its mission is usually identical to that imposed on others; that is, the same degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances.[13]

Although courts often rely on various legal relationships in defining the rights and obligations of students and schools when cases involve student crime or violence, there is a discernable trend to

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8. Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).
9. New Jersey v. T.L.O., 469 U.S. ___, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Educ. L. R. 1122 (1985).
10. *See* Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979).
11. The most commonly raised theory of the student-school relationship, at least in post-secondary education, is the contract theory. Thus, courts enforce the reasonable expectations of the parties. *See generally* J. Rapp, *Education Law* § 8.01 [2] (Matthew Bender & Company, Incorporated). Implicit in some decisions is the view that the right to a safe school is one of those expectations. *See, e.g.*, Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193, 19 Educ. L. R. 689 (1984); Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983).
12. As discussed in Chapter Seven, the student-school relationship may, in various circumstances, be legally analogous to those of parent-child (teacher-student or *in loco parentis*), master-servant (school-student employee or work study student), lessor-lessee (school-student dormitory resident), innkeeper-guest (school-temporary occupant of housing or student union hotel), landowner-occupier (school-trespasser, licensee or invitee), governmental body-citizen (public school-student or third party), security force-invitee, licensee or trespasser (school security force-student or third party), and common carrier-passenger (school transportation service-student), among others.
13. *See* Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970). This rule does not, of course, apply where an immunity or the *in loco parentis* doctrine applies. *See* Chapter Six *supra*.

include the right to safe schools as an element of the student-school relationship.[14] Thus, when students attend school they expect that they not only will be afforded the means to derive an education in an atmosphere conducive to the stimulation of thought and learning, but also that he will be permitted to do so in environments reasonably free from risk of harm.[15] This expectation is considered particularly appropriate in the closed environment of a school campus[16] or where, as in school, there is custody of[17] and an absolute right to control students' behavior.[18]

As with other failure-to-protect cases in the school setting, almost every case involves a common legal scenario: 1) the victim alleges that, in the circumstances of the case, the school had a duty to protect against or prevent crime and that this duty was breached, proximately causing injury or death to the victim; 2) the defense counters with the duty-at-large rule or the intervening cause doctrine; 3) the victim then asserts that an exception to the duty-at-large rule or intervening cause doctrine exists, such as a special relationship between the school and the victim. Where applicable, arguments are sculpted to either assert or avoid immunity doctrines.[19]

Against this general background, cases involving the liability of schools for the failure to protect against or prevent student crime or violence fall into several categories, although there is naturally some overlap. The categories include: 1) failure to supervise; 2) failure to apprehend or restrain identifiable dangerous students; 3) negligent admission of dangerous students; 4) negligent placement of dangerous students; and, 5) negligent selection, retention or training of staff.

Failure to Supervise

Robert Hammack was a student at Rogers Middle School. Part of his curriculum included a shop class.[20] The room where the shop class

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14. *See generally* Chapter Two *supra*.
15. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 963, 25 Educ. L. R. 876 (1985).
16. Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193, 19 Educ. L. R. 689 (1984).
17. McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953).
18. Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985).
19. The existence of a constitutional right to safe schools, as in California, will likely diminish the viability of the duty-at- large or intervening cause defenses, or constitute a specific exception to them. *See* Chapter Two *supra*. This right should also avoid claims of immunity. *See* Chapter Six *supra*.
20. Robert was emotionally handicapped and was mixed in with regular students as part of a federally-required "mainstreaming" effort which mandates such intermingling in certain vocationally-oriented classes.

was held was approximately twice the size of a normal classroom. It contained numerous pieces of large machinery which the students normally used for various projects. Adjacent to the classroom were several smaller rooms, including a paint-finishing room in the rear of the classroom.[21]

On a particular day of class, a substitute teacher was present due to the regular teacher's absence. Because the substitute was not certified as a shop teacher, students were not allowed to use power machinery and were instead directed to work on projects which could be completed with hand tools, or to work on homework from other classes. As a result, the noise level only slightly exceeded that of a normal study period.[22]

Following the directions of the substitute, Robert began to work on a Christmas project. At some point, he went to the paint room to obtain paint for his project. While there, he was confronted by Robert Holloway and Tony Osborne. They shut the lights off in the small room and began harassing Robert. The substitute noticed this, went back and chased the students out, and locked the paint room door.[23]

Not long afterwards, Holloway and Osborne again approached Robert. This time, according to Robert, Holloway began striking him and threatened to beat him up unless he performed oral sex on Holloway. With Osborne and other students acting as lookouts, Robert, at the rear of the class and at least partially hidden by a portable chalkboard, was forced to perform oral sex on Holloway. The entire incident may have lasted as long as ten minutes. In addition to those students directly involved, other students also witnessed the assault.[24]

There was some question just where the substitute was during the episode. Most students said the substitute was in the front of the classroom, but Holloway said he was out of the classroom during the incident. The substitute said that he was generally by his desk or walking around by the tables. In any event, the substitute had no knowledge of the incident and, in fact, did not learn of the incident until a later date.[25]

Holloway's propensity to engage in sexually aggressive conduct had been the topic of some discussion among the school's adminis-

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21. Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

tration and students alike. Holloway had apparently exposed himself to other students during class. He had been suspended at least twice for fondling and making sexually suggestive remarks to female students. Concerned for their daughter's safety, the parents of one student unsuccessfully sought to have her transferred from the shop class attended by Holloway.[26]

Although a school is not an insurer against a student being injured, it is entrusted with the care of its students and has a legal duty to properly supervise student activity.[27] In those instances where lack or insufficiency of supervision is charged, a school or teacher has an obligation to exercise reasonable, prudent, and ordinary care,[28] or care akin to what a reasonable and prudent parent would exercise under the circumstances.[29]

In determining the duty of a school under a particular set of circumstances, consideration of various factors may be helpful including: 1) the activity in which the students are engaged; 2) the instrumentalities with which they are working (*e.g.* dangerous chemicals); 3) the age and composition of the class; 4) past experience with the class and its propensities; 5) the reason for and duration of any absence or lack of supervision;[30] and, 6) the ability of the school to anticipate danger.[31] However, the determination generally must be made on a case by case basis.[32]

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26. *Id.*

27. *Id. See also* Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970); Rupp v. Bryant, 417 So. 2d 658, 5 Educ. L. R. 658 (Fla. 1982); Eastman v. Williams, 124 Vt. 445, 207 A.2d 146 (1965).

28. *Id.* (citing Benton v. School Bd. of Broward County, 386 So. 2d 831 (Fla. Dist. Ct. App. 1980)). *See also* Miller v. Grissel, 261 Ind. 604, 308 N.E.2d 701 (1974); Swartley v. Seattle School Dist., 70 Wash. 2d 17, 421 P.2d 1009 (1966); Connett v. Fremont County School Dist., 581 P.2d 1097 (Wyo. 1978).

29. Swaitkowski v. Board of Educ., 36 A.D.2d 685, 319 N.Y.S.2d 783 (1971).

Cases involving supervision can sound very similar to so-called educational malpractice claims. Such claims are generally not cognizable under the law. *See generally* J. Rapp, *Education Law* § 12.03 (Matthew Bender & Company, Incorporated). *See also* P. Zirkel, *Educational Malpractice: Cracks in the Door?*, 23 Educ. L. R. 453 (1985). Unlike educational malpractice, claims for failure to supervise students who injure others is predicated on well-recognized principles. Cavello v. Sherburne-Earlville Central School Dist., 494 N.Y.S.2d 466, 28 Educ. L. R. 537 (1985).

30. *See* Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 150 N.W.2d 460 (1967).

31. Lauricella v. Board of Educ., 52 A.D.2d 710, 381 N.Y.S.2d 566 (1976).

32. A good example of this is the determination of when a teacher is considered negligent in playground supervision. *See, e.g.*, Charonnat v. San Francisco Unified School Dist., 56 Cal. App. 2d 840, 133 P.2d 643 (1943) (negligence found where only one teacher was assigned to supervise some 150 boys engaged in many games); Capers v. Orleans Parish School Bd., 365 So. 2d 23 (La. Ct. App. 1978) (no liability where there were six to eight adults supervising 250-300 students although injured student wandered from normal play area); Silverman v. City of New York, 28 Misc. 2d 20, 211 N.Y.S.2d 560, *aff'd*, 15 A.D.2d 810, 225 N.Y.S.2d 77 (1962) (jury verdict upheld finding school negligent by assigning one teacher for supervision of school yard when 200 to 250 students were present, including students known to be troublesome).

No doubt Rogers Middle School had a duty to supervise the shop class in which Robert Hammack was sexually assaulted.[33] That duty was breached when the substitute teacher was either absent (if that was the case) or failed to actively supervise the class while present.[34]

Although a school may be negligent in providing supervision, it is liable only if there is a reasonably close causal connection between the conduct or negligence and the resulting injury, that is, proximate cause.[35] Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk.[36] An unreasonable risk necessarily involves a foreseeable risk. If one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in light of what one could anticipate, there would be no negligence, and no liability.[37]

In the school setting, there have been two views regarding the foreseeability of injuries resulting from negligent supervision. According to one view, proximate causation between a student's injuries and a teacher's absence or negligent supervision exists *only* where the injury could have been prevented by the teacher's presence or adequate supervision[38] and there is knowledge that the injuries might occur.[39] Under this view an intervening cause,[40] such as student crime or violence, would often shield a school from liability. However, even under this view, dangerous conditions may require a higher standard of supervision.[41]

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33. The Court noted that the sexual assault occurred while class was in session. Since the school had an absolute right to control the students' behavior at that time, the school also had a corresponding duty to protect and supervise them. Moreover, the Court noted that it is reasonable to conclude that the school's duty to actively supervise the students in this case was even greater than would otherwise be imposed due to the unique combination of factors in this case, including but not limited to: 1) the oversized classroom; 2) the presence of dangerous machinery; and, 3) the intermingling of regular and emotionally and mentally handicapped students. Collins v. School Bd. of Broward County, 471 So. 2d 560, 564, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985).
34. Collins v. School Bd. of Broward County, 471 So. 2d 560, 564-65, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985).
35. W. Keeton, *Prosser and Keeton on The Law of Torts* 165 (5th Ed. 1984).
36. W. Keeton, *Prosser and Keeton on The Law of Torts* 280 (5th Ed. 1984).
37. *Id.*
38. *See* Morris v. Ortiz, 103 Ariz. 119, 437 P.2d 652 (1968); District of Columbia v. Cassidy, 465 A.2d 395, 13 Educ. L. R. 755 (D.C. 1983); Segerman v. Jones, 256 Md. 109, 259 A.2d 794 (1969); Ohman v. Board of Educ., 300 N.Y. 306, 90 N.E.2d 474 (1949); Swaitkowski v. Board of Educ., 36 A.D.2d 685, 319 N.Y.S.2d 783 (1971); Rock v. Central Square School Dist., 494 N.Y.S.2d 579, 28 Educ. L. R. 548 (N.Y. App. Div. 1985); Guyten v. Rhodes, 65 Ohio App. 163, 29 N.E.2d 444 (1940); Fagan v. Summers, 498 P.2d 1227 (Wyo. 1972).
39. *See* James v. Charlotte-Mecklenburg Bd. of Educ., 300 S.E.2d 21, 9 Educ. L. R. 401 (N.C. Ct. App. 1983); Silverman v. City of New York, 28 Misc. 2d 20, 211 N.Y.S.2d 560 (1961), aff'd, 15 A.D.2d 810, 225 N.Y.S.2d 77 (1962); Simonetti v. School Dist. of Philadelphia, 454 A.2d 1038, 8 Educ. L. R. 1017 (Pa. Super. Ct. 1983).
40. The intervening cause doctrine is discussed in Chapter 7 *supra*.
41. Cioffi v. Board of Educ., 27 A.D.2d 826, 278 N.Y.S.2d 249 (1967) (hard frozen snow was a

The alternative view assumes that certain student misbehavior is itself foreseeable and therefore is not an intervening cause which will relieve a school from liability.[42] Under this view a school may be liable for injuries sustained, as it was in the case involving Robert Hammack, although only the general type of harm could have been foreseen.[43] Thus, for example, where a school should have realized that 15 year old boys would likely perform acts of indecency if allowed unrestricted access to a darkened, out-of-the-way room, the school will be considered negligent although the particular type of indecency - rape, molestation, indecent exposure, seduction, etc. - cannot be specifically anticipated.[44] Student supervision is necessary precisely because of the tendency of some students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm.[45]

Although under the alternative view misbehavior is foreseeable, the fact that each student is not personally supervised every moment of each school day usually does not constitute fault on the part of a school.[46] Thus, spontaneous and/or planned acts of violence by students on school grounds generally do not create liability on behalf of the school if the school grounds are well supervised.[47]

Supervision cases often arise in the classroom, playground and other areas in which students congregate. The scope of this responsibility is far broader, however. Schools, for example, also have such responsibilities as: 1) preventing students from engaging in campaigns of threats and harassment against fellow students;[48] 2) controlling substance abuse;[49] and, 3) preventing truancy.[50]

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dangerous condition warranting supervision in view of the common knowledge of the propensity of children to engage in snowball throwing).

42. *See* Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970) (citing several related California cases); Charonnat v. San Francisco Unified School Dist., 56 Cal. App. 2d 840, 133 P.2d 643 (1943); Rupp v. Bryant, 417 So. 2d 658, 5 Educ. L. R. 1309 (Fla. 1982); Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985).

43. Collins v. School Bd. of Broward County, 471 So. 2d 560, 566, 26 Educ. L. R. 53 (Fla. Dist. Ct. App. 1985). *See also* Ziegler v. Santa Cruz City High School Dist., 168 Cal. App. 2d 277, 335 P.2d 709 (1959).

44. McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953) (12 year old girl raped by fellow students).

45. Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970).

46. Narcisse v. Continental Insurance Co., 419 So. 2d 13 (La. Ct. App. 1982); Hampton v. Orleans Parish School Bd., 422 So. 2d 202 (La. Ct. App. 1982).

47. Nicolosi v. Livingston Parish School Bd., 441 So. 2d 1261, 15 Educ. L. R. 425 (La. Ct. App. 1983) (no liability where fight was planned in "off-limits" area if supervision adequate and teacher proceeded to scene in an attempt to stop the fight as soon as she saw the students "squared off").

There is no doubt a point when "spontaneous and/or planned acts of violence" become such common occurences that they are no longer spontaneous and become foreseeable.

48. *See, e.g.*, Cavello v. Sherburne-Earlville Central School Dist., 494 N.Y.S.2d 466, 28 Educ. L. R. 537 (N.Y. App. Div. 1985).

Failure to Apprehend or Restrain Identifiable Dangerous Students

Peter Jesik II was registering as a student for the fall semester at Phoenix College. Charles Doss, another student,[51] had "words" with Jesik. Doss then threatened Jesik that he was going home to get a gun and coming back to the college campus to kill him. Jesik reported this to Scott Hilton, a college security guard, and received assurances of help and protection. Jesik then continued with his registration. Hilton allegedly failed to arm himself or take any other precautionary measures.[52]

Approximately an hour later, Doss returned to campus carrying a briefcase. He proceeded to the gymnasium where Jesik was continuing his registration. Jesik again contacted Hilton and pointed out Doss and the briefcase. Again, Jesik was assured of help and protection, and he remained in the gymnasium in reliance on these assurances. Hilton approached Doss, questioned him and, apparently satisfied, turned his back on Doss and walked away. Doss immediately pulled a gun from his briefcase and shot and killed Jesik.[53]

In order to avoid the duty-at-large rule or intervening cause doctrine, individuals often attempt to pinpoint some specific individual from whom crime or violence might have been anticipated. Although a school is generally not liable for some "generalized danger" to an individual,[54] it is more likely to be liable where a specific dangerous person may be singled out. Arguably, such circumstances bring the individual much closer to the "special relationship" exception to the duty-at-large rule or intervening cause doctrine.

The death of Peter Jesik II presents a case where the school, or its employee, "had specific and repeated notice of both the actor and the exact type of harm that did in fact occur."[55] Under such circumstances, the school had a specific duty to exercise reasonable care to

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49. *See* J. Ullman, *After T.L.O.: Civil Liability for Failure to Control Substance Abuse?*, 24 Educ. L. R. 1099 (1985).
50. *See, e.g.*, Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978).

    In the *Hoyem* case, the Supreme Court of California held that a school may be liable for injuries to a student who had been struck by a motorcycle after leaving school grounds without permission. Liability is not based on any alleged failure to supervise the student when off school premises, but rather on a failure to exercise due care in supervision on school premises (*i.e.*, allowing him to become truant). Clearly, if a school may be liable for injuries sustained by the truant himself, it may be liable for injuries done by the truant to others.
51. State v. Doss, 116 Ariz. 156, 568 P.2d 1054, 1056 (1977) (relating to Doss' criminal conviction).
52. Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980).
53. *Id.*
54. *See* Chapter Seven *supra*.
55. Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547, 551 (1980).

protect him and could be held liable for his death.[56]

The obligation of a school to apprehend or restrain an identifiable dangerous individual is a corollary to its obligation to supervise students.[57] In one example of this, it was held that the parents of Anthony, Jr. and Tina Cavello could sue for damages where the school did not prevent their children from being harassed.[58] Soon after starting school, Tina was ceaselessly badgered by another student named Bobby Jo; verbal abuse, foul language, death threats and the brandishing of a knife characterized the ongoing harassment which Tina apparently suffered for nearly a year. Tina's brother was subject to considerably less, but like, harassment. School officials were repeatedly advised of the intimidating conditions. Rather than deal with the student causing the problem, the school first segregated Tina from other students and later arranged for tutoring at home. At one point a school guidance counselor "placed Tina and Bobby Jo in a room, telling Bobby Jo to lock the door from the inside and 'settle your difference.'" The school finally informed the Cavello parents that "it was too dangerous for their children Tina and Anthony, Jr. to come to school and stated that the District would provide the children a correspondence course."[59] The duty to supervise thus includes the obligation to protect students from being harassed by others.[60]

Despite the outcome in Jesik, courts are still reluctant to impose liability under to duty-at-large rule or intervening cause doctrine. In one often-cited case,[61] Linda Riss, an attractive young woman, was pursued by the attentions of an unwanted suitor, one Pugach, whose attentions took the form of terrorizing her and threatening to kill her if she did not yield to him. Riss repeatedly asked the police for protection and was repeatedly refused. She received a "last chance"

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56. *Id. See also* Tarasoff v. Regents of the University of California, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976) (where psychotherapist determines that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the intended victim against such danger).

57. *Id.* (supplemental opinion).

58. Cavello v. Sherburne-Earlville Central School Dist., 494 N.Y.S.2d 466, 28 Educ. L. R. 537 (N.Y. App. Div. 1985) (claim for emotional distress).

59. *Id.* 494 N.Y.S.2d at 467.

The school's reaction reminds one of the wisdom of former Israeli Prime Minister Golda Meir who related considering the issue of rape:

> Once in a Cabinet meeting we had to deal with the fact that there had been an outbreak of assaults on women at night. One minister suggested a curfew; women should stay home after dark. I said, "But it's the men who are attacking the women. If there's to be a curfew, let the men stay home, not the women." Pogrebin, *Do Women Make Men Violent?*, MS. Magazine at 55 (Nov., 1974).

60. *See also supra* (discussion of failure to supervise).

61. Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1963).

telephone call from Pugach and again begged the police for help, but to no avail.

The "next day Pugach carried out his dire threats in the very manner he had foretold by having a hired thug throw lye in Linda's face. Linda was blinded in one eye, lost a good portion of her vision in the other, and her face was permanently scarred."[62] Riss' claims for damages were rejected because special circumstances were not, according to the court, established. Moreover, it emphasized the basic policy consideration that a municipality should not be liable merely upon a showing of probable need for and request for protection in view of the staggering amount of crime that is undeniably prevalent. If scarce criminal justice resources were to be allocated to such requests, it should be based on a mandate from the legislature.[63]

Negligent Admission of Violent Students

Larry Campbell was conditionally released from prison and enrolled as a student at the State University College at Buffalo in a program for the economically and educationally disadvantaged designated under the acronym SEEK (Search for Education, Elevation and Knowledge). Campbell's prison incarceration resulted from reduced pleas in satisfaction of three separate indictments all involving violent conduct and including a charge of attempted murder.[64] Prior to those indictments, Campbell had been arrested approximately 25 times, charged with a variety of crimes including assault, robbery and a number of drug-related crimes. Each time he was released on parole he immediately reverted to his heroin abuse[65]

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62. *Id.* 22 N.Y.2d at 583.

63. In California, this mandate may have been given by voters with respect to school crime and violence when they adopted a constitutionally guaranteed right to safe schools. *See* Chapter Two *supra*.

The *Riss* case took an ironic twist after the civil case was disposed of. Following Pugach's release from prison, Riss married "Poogie" on the advice of a fortune teller. *See* J. Oates, *A Very Different Love Story*, New York Times, Feb. 6, 1977, Section 7 (Book Reviews), p. 5, col. 1.

64. On the first indictment it was charged that Campbell robbed a motorist at gunpoint, ordered him out of his car and took the car. When the police apprehended him they found a loaded .32 caliber revolver and 77 decks of heroin. On the second indictment he was charged with attempted murder, attempted assault in the first degree and robbery in the first degree resulting from an incident in which he and other individuals robbed a woman of $26.00, threw her to the ground and fired a pistol, creasing her skull. The third indictment involved a charge that Campbell and another entered a drug "shooting gallery," robbed the occupants, stripped a woman of her clothes in view of the men present, struck her about the face and body, beat her with an electric wire and inserted his hand into her vagina. When one of the men began to lower his hands, Campbell stabbed him several times in the stomach with a knife. In satisfaction of those indictments, Campbell was allowed to plead to criminal possession of a dangerous drug and received a maximum sentence of six years. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 960-61, 25 Educ. L. R. 876 (1985).

which led to other crimes and violations of parole. During various psychiatric examinations it was concluded that Campbell suffered from chronic schizophrenia, paranoid type, with an impulsive-explosive personality, a high criminal potential, including a potential for killing, a high mental pathology potential and a low rehabilitation potential.[66]

Participation in the SEEK program involved accepting incarcerated felons. When Campbell applied, he stated that his present and former addresses were correctional facilities. Although the application form requested an employer, pastor, teacher, principal, etc., as references, Campbell listed his fiancee and two others who were residents of Buffalo, where Campbell had never lived, and had no opportunity to make observations and judgments as to Campbell's character and fitness. A Health Report and Physicians' Certificate was prepared by an examining physician at the correctional facility at which Campbell resided and failed to indicate any emotional instability.[67]

When Campbell began[68] his studies he lived in a dormitory on campus with the son of his sponsor for the program, a professor at the College, through whom he became friends of Rhona Eiseman, Thomas Tunney and Teresa Beynard, fellow students, and Michael Schostick, a non-student. About six months after he began the program, Campbell went to an apartment approximately one block from the College and murdered Tunney, raped and murdered Eiseman, and inflicted serious bodily injuries on Schostick by stabbing him six times. Beynard managed to escape.[69]

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65. Campbell was using up to 25 bags a day while not incarcerated. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 961, 25 Educ. L. R. 876 (1985).

66. *Id.*

67. In answer to the question on the Health Report, "Is there any evidence of anxiety or other tension states or emotional instability?", the physician answered, "No." Under the heading "Prior Conditions and Diseases," the physician failed to indicate Campbell's long history of abusing heroin and other drugs. No response was given to the question, "Have you ever been under the care of a psychiatrist?" *Id.*

68. Campbell anticipated beginning in the program in a fall semester. However, after being admitted into an temporary release program, he absconded from a work site, took a car and drove to Buffalo. As a result, he was removed from the temporary release program and, while awaiting transfer to a correctional facility, attempted suicide. He was then sent to a psychiatric diagnostic and evaluation unit. He wrote to his SEEK counselor telling him of his suicide attempt and of problems he was having in prison, and requesting a leave of absence from the College so that he could enter in the next semester. The SEEK counselor wrote to Campbell informing him that he was on official leave of absence and would be expected to "return" for the following semester. Despite receiving information regarding the suicide, no attempt was made to check into Campbell's background or emotional stability. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 961-62, 25 Educ. L. R. 876 (1985).

69. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 960, 25 Educ. L. R. 876 (1985).

Schools have wide discretion to establish admission standards or requirements.[70] Where this discretion is limited by an individual's constitutional or statutory right to attend, as it often is at the public elementary and secondary levels, a school may nevertheless have wide discretion in placing the student in a particular educational setting.[71] In developing or implementing admission standards or requirements, a school is generally not obligated to screen prospective students with an eye toward rejecting potentially dangerous individuals.[72] A different situation arises, however, where a school embarks on an experimental program for the admission of convicted felons or dangerous individuals, as did the State University College at Buffalo when it decided to participate in the SEEK program.

Where a school participates in a program through which its accepts incarcerated felons or other dangerous individuals, it concomitantly assumes a further duty to establish rational criteria for screening these applicants and to make such inquiry as would enable it to evaluate the risks such persons pose for the rest of the school community and to take measures to minimize those risks.[73] A school is not expected to be a guarantor or insurer of the safety of its students, but obviously is expected to provide, in addition to an intellectual climate, a physical environment harmonious with the purposes of an educational institution.[74] A school that participates in a program such as SEEK without adequate study, without establishing a rational basis for selecting those persons with the greatest potential to succeed and without inquiring into the backgrounds of the applicants, is negligent and liable for injuries or death to students.[75]

As in other negligence cases, the question of proximate cause, or foreseeability, arises. Thus, it was held that it was foreseeable that a person such as Campbell might injure or kill a fellow student.[76]

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70. *See generally* J. Rapp, *Education Law* § 8.02 (Matthew Bender & Company, Incorporated) (regarding admission of students).

71. *See infra* (regarding negligent placement of students).

72. Eiseman v. State, 109 A.D.2d 46, 489 N.Y.S.2d 957, 963 and 965, 25 Educ. L. R. 876 (1985).

73. According to the Court in *Eiseman*:

> . . . Obviously, if rational criteria had been established, a person with a history of violent psychotic episodes, drug abuse and felonious assaults would not have been eligible. Moreover, once alerted to the fact of Campbell's incarceration, suicide attempt and problems within the Correctional system, a reasonable inquiry of prison officials would have revealed Campbell's criminal and psychatric history, and his propensity for violence. Provided with that knowledge, it is inconceivable that the College would have admitted Campbell. Eiseman v. State, 109 A.D.2d 46, 489 N.Y.S.2d 957, 965, 25 Educ. L. R. 876 (1985).

74. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 963, 25 Educ. L. R. 876 (1985).

75. *Id.* 489 N.Y.S. 2d at 965.

76. According to the Court in *Eiseman*:

However, the duty assumed by the school extended only to the school community and did not extend to the general population and thus the school was not liable for the injuries sustained by Schostick, a non-student.[77]

Negligent Placement of Violent Students

Josette Ferraro attended a New York junior high school. The students had lined up in preparation for a change of period when another student attacked her, apparently without cause. The substitute teacher assigned to the students attempted to intervene but quickly became aware of her inability to stop the assault because the other student attempted then to strike the teacher. Another teacher was summoned. She entered the room, blew a whistle and then the fracas stopped, but not before Josette had been injured.[78]

The student who attacked Josette had been transferred to Josette's junior high school from another junior high school only a couple of months before because of a record of misbehavior. According to the student's record, she had been a source of constant quarreling and aggressive behavior toward other students as well as teachers. Indeed, since her enrollment, she had already assaulted other students on at least three occasions. On other occasions, she suddenly burst forth with some other form of misbehavior for which there was no apparent reason.[79]

Although the principal and others were well aware of the misconduct of the other student, the substitute teacher who was assigned to Josette's class on the day of the attack had never been told by anyone about the behavior of the student. Nothing in her contact with the students alerted her to the problem as well.[80]

As in the case of admissions, schools have wide discretion in the placement of students. Students do not have a right to be seated at a particular desk in a particular room at a particular school.[81] Students

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> . . . It was, therefore, predictable that as part of the social interaction within the College, fellow students would befriend Campbell and invite him into their homes and apartments. It was also foreseeable that fellow students, viewing Campbell as their peer, would neglect to take precautions which might in other circumstances have prevented them from associating with someone of Campbell's background. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 965, 25 Educ. L. R. 876 (1985).

77. *Id.*

78. Ferraro v. Board of Educ., 32 Misc. 2d 563, 212 N.Y.S.2d 615, 617, *aff'd*, 14 App. Div. 2d 815, 221 N.Y.S.2d 279 (1961).

79. *Id.* 212 N.Y.S.2d at 616. The junior high school principal had recommended medical attention for the child and requested on several occasions to have the Bureau of Child Guidance to examine the student concerning her emotional stability. Despite his requests, no examinations were made.

80. *Id.* 212 N.Y.S.2d at 617.

may be placed or grouped on the basis of various criteria.[82] Placement of students in an alternative educational program or facility is actually a well recognized method of student control and discipline.[83] If there is a right to remain in a regular school setting, it should be a right of well-behaved students rather than students who engage in school crime and violence.[84]

In the case involving Josette Ferraro, the school was negligent in failing to alert the substitute teacher about the misconduct of the student who perpetrated the attack. Consequently, the substitute teacher was not in a position to determine whether any supervisory steps had to be taken by her in regard to the other students. If she had been informed, she would have been in a position to have acted to prevent the assault, such as compelling the unruly child to sit in a seat directly in front of the teacher, having the child stand immediately in front of the line to prevent a tendency towards mischief when not under strict observation, or, possibly, having transferred the child for the day that the substitute teacher was there to the care of a more mature and experienced teacher.[85]

According to the Restatement (Second) of Torts:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.[86]

Similarly, where a school has notice a student's propensities to harm others, it has an obligation to take reasonable steps to prevent the

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81. J. Rapp, *Education Law* § 4.01[3] (Matthew Bender & Company, Incorporated).
82. *Id.* at § 8.05.
83. *Id.* at § 9.06[3][g]. Procedural due process may be implicated prior to utilizing this, as well as other, discipline methods. *Id.* at § 9.05.
84. *Cf.* Cavello v. Sherburne-Earlville Central School Dist., 494 N.Y.S.2d 466, 28 Educ. L. R. 537 (N.Y. App. Div. 1985) (school suggested that well-behaved students accept homebound instruction while disruptive student remained in regular classes because "it was too dangerous for . . . [them] to come to school").
85. Ferraro v. Board of Educ., 32 Misc. 2d 563, 212 N.Y.S.2d 615, *aff'd*, 14 App. Div. 2d 815, 221 N.Y.S.2d 279 (1961).
86. Restatement (Second) of Torts § 315 (1965). An illustration provided by the Restatement is as follows:

> A is informed that his six-year-old child is shooting at a target in the street with a .22 rifle, in a manner which endangers the safety of those using the street. A fails to take the rifle away from the child, or to take any other action. The child unintentionally shoots B, a pedestrian, in the leg. A is subject to liability to B.

student from doing so.[87]

Negligent Selection, Retention or Training of Staff

Brian Kelson confronted a teacher in his classroom, brandishing a .38 caliber revolver and demanding that the teacher place the coins in his desk drawer on the desk top. The teacher complied, and then persuaded Brian to accompany him to an empty room where the vice principal, Ronald Schiessel, was waiting. Brian showed Schiessel a suicide note. During this time, Brian kept the handgun in the waistband of his trousers. Although Brian asked to talk to his favorite teacher, he was not permitted to do so.[88]

School officials called the local police department. The police in turn called Brian's parents to notify them of the situation. As Brian and Schiessel left the empty room on their way to Schiessel's office, they were confronted by Officer Jerry Smith. Smith informed Brian that he was "in trouble with the law." Five minutes later Brian left Schiessel, entered the boys' rest room and shot himself. Brian died later that morning.[89]

Schools have a duty to use reasonable care in the selection, retention and training of its administrators, teachers and staff. This duty requires that a school hire and retain only safe and competent employees. A school breaches this duty when it hires or retains employees that it knows or should know are incompetent, or fails to adequately train them.[90]

A school or other employer is generally liable under the *respondeat superior*[91] doctrine for the wrongful acts of an employee which were committed while the employee was acting within the scope of his employment or in furtherance of his employer's interests.[92] Where an employee acts outside the scope of his employment, the doctrine does not apply. A school would not, for example, be liable for damages where an adult teacher- counselor engages in sexual contact with a 16 year old student.[93]

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87. Ferraro v. Board of Educ., 32 Misc. 2d 563, 212 N.Y.S.2d 615, *aff'd*, 14 App. Div. 2d 815, 221 N.Y.S.2d 279 (1961). *See also* Cal. Welf. & Inst. Code § 827b (requiring reports).

88. Kelson v. City of Springfield, 767 F.2d 651, 652-53, 26 Educ. L. R. 182 (9th Cir. 1985).

89. *Id.* 767 F.2d at 653.

90. *See generally* 29 Am. Jur. Trials 272 (1982) (regarding negligent hiring and retention of an employee).

91. This maxim literally means: "Let the master answer."

92. *Id.* 29 Am. Jur. Trials at 279. *See, e.g.*, Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980).

93. Horace Mann Insurance Co. v. Independent School Dist., 355 N.W.2d 413, 20 Educ. L. R. 686 (Minn. 1984). However, by statute the school was obligated to *defend* the teacher although an action alleges malfeasance or willful or wanton neglect of duty.

If the *respondeat superior* doctrine does not apply, liability nevertheless may be imposed on an employer if it has selected, retained or inadequately trained its employee.[94] In such cases, the connection between the employment relationship in question and the plaintiff is critical in determining liability.[95] The relationship between a school administrator, teacher or staff member is clearly sufficient.

Courts have, in various cases, considered the liability of employers for the negligent selection[96] and retention[97] of employees. A developing area of the law involves negligent training.[98] Thus, in the Brian Kelson case, it was held that a claim may be based on a theory of implementation of a policy of inadequate suicide prevention training.[99] School administrators, teachers and staff must be competent to prevent students from being a danger to themselves or others.[100] They must also be competent to deal with school crime and violence generally.[101]

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94. This liability is not vicarious liability for the employee's acts. Rather, the employer is liable for its own negligence.

95. It has been suggested that three requirements concerning the plaintiff and the employment relationship must be satisfied before the law will impose a duty upon the employer to use due care in the selection, retention or training of staff. These requirements are that: 1) the incompetent employee and plaintiff are in places where each have a right to be at the time that the plaintiff sustains injury; 2) the incompetent employee and the plaintiff came into contact as a direct result of the employment; and, 3) the employer has received or would have received some benefit, either direct, indirect or potential, from the meeting of the employee and the plaintiff. 29 Am. Jur. Trials 272, 284 (1982). *See generally* Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 Chi.-Kent L. Rev. 717 (1977).

96. *See generally* 29 Am. Jur. Trials 267 (1982) (regarding negligent hiring and retention of an employee); Note, *The Responsibility of Employerers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 Chi.-Kent L. Rev. 717 (1977); Annot., 34 A.L.R.2d 372 (1954) (regarding liability of employer for a personal assault upon customer, patron, or other invitee); Annot., 48 A.L.R.3d 359 (1973) (regarding extent to which employer's knowledge of employee's past criminal record affects liability for employee's tortious conduct).

97. *Id.*

98. *See* Oklahoma City v. Tuttle, 471 U.S. ___, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) (where wife alleged city's failure to provide adequate training for its police officer resulted in the shooting of her husband, depriving him of life without due process of law, jury instruction deficient which did not require proof of a conscious adoption of an institutional policy of inadequate training, or of a causal connection between the policy and the alleged constitutional deprivation).

Cf. Nunn v. State, 35 Cal. 3d 616, 677 P.2d 846, 200 Cal. Rptr. 440 (1984) (community college immune from liability for alleged negligent failure to provide adequate instruction and timely test in firearms instruction course where enrollee was fatally shot while patrolling a manufacturing plant and had not, as a result of such alleged negligence, been licensed to carry a firearm).

99. Kelson v. City of Springfield, 767 F.2d 651, 26 Educ. L. R. 182 (9th Cir. 1985) (although Kelson's parents were being provided an opportunity to plead such a claim, the Court did not express an opinion whether an actionable policy of inadequate training could be pleaded in the circumstances of the case).

100. *See* Furth v. Arizona Bd. of Regents, 139 Ariz. 83, 676 P.2d 1141, 16 Educ. L. R. 631 (1983) (school and staff not liable where protective measures were taken to prevent student who was mentally incompetent from committing acts likely to cause serious bodily harm to himself or others).

101. The California constitutional right to safe schools clearly contemplates that schools must deal with school crime and violence regardless of increased costs. Tort law similarly requires that staff confront school crime and violence, refusing to allow schools to ignore foreseeable crime and violence with indifference.

Chapter IX

Schools Respond: Providing Safe Schools

The future of this Nation lies in the quality of the education of our children. The fortunes of American schools and American society are thus inseparable. When schools succeed, society succeeds; when schools fail, society fails.[1] The success of many of our Nation's schools and thereby our greatest resource - our children - has been jeopardized by crime and violence.

In some circumstances, society has come to tolerate human loss. For example, the theory underlying workers compensation acts is that "the cost of the product should bear the blood of the workman."[2] Loss of flesh or life is treated as a cost of production, like the breakage of tools or machinery.[3] This Nation should not consider the human loss, not to mention property damage, we annually suffer from crime and violence in our schools as an acceptable cost in educating our children. Schools must respond to school crime and violence by assuring students a safe, peaceful, secure and welcoming educational environment.

School Responsibility

To provide safe schools, school officials must first recognize that many are unsafe and that crime and violence are problems. The cases involving Madelyn Miller,[4] Kathleen Peterson,[5] Robert Hammack,[6]

1. National School Board Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* at iii (1984).
2. W. Keeton, *Prosser and Keeton on The Law of Torts* 573 (5th Ed. 1984)
3. *Id.* Prior to these acts industrial accidents generally were not compensated, primarily because of the rule that an employer was not liable for injuries caused solely by the negligence of a fellow servant. *Id.* at 571.
4. Miller v. State of New York, 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829, 19 Educ. L. R. 618 (1984).
5. Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842, 19 Educ. L. R. 689 (1984).
6. Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985).

Peter Jesik II,[7] Josette Ferraro,[8] Brian Kelson,[9] the victims of Larry Campbell[10] and the others discussed in this book highlight these problems. To a greater or lesser extent, far too many other schools throughout the Nation witness crime and violence as well.

Schools often do not openly recognize the problems of crime and violence.[11] According to one report,[12] schools consciously and actively play down the incidents of crime and violence for many reasons. Schools and their administrators commonly were found to do so because they:

* Wish to avoid bad publicity;
* Sense they will be blamed as poor leaders;
* Wish to avoid litigation;
* Think some offenses too minor to report;
* Prefer to rely on their own security and discipline;
* Suspect the police and courts will not cooperate; and
* Fear they will be regarded as ineffective.

Teachers commonly were found to refrain from reporting crime and violence because they:

* Sense they will be blamed;
* Wish to avoid litigation;
* Fear retaliation by the offender;
* Have trouble identifying the offender; and
* Do not wish to stigmatize young offenders.

Another task force found that while most school boards are genuinely outraged at student misconduct, crime and violence, they do not consider themselves responsible for eliminating the problem.[13]

The inaction of schools in dealing with student misconduct, crime and violence actually contributes to these problems.[14] The perpetrators believe that they "can get away with it." Others turn to crime and violence in self-defense because "that's the only way I can protect myself" or "get along with my peers." Crime and violence can quickly

7. Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980).
8. Ferraro v. Board of Educ., 32 Misc. 2d 563, 212 N.Y.S.2d 615, *aff'd*, 14 App. Div. 2d 815, 221 N.Y.S.2d 279 (1961).
9. Kelson v. City of Springfield, 767 F.2d 651, 26 Educ. L. R. 182 (9th Cir. 1985).
10. Eiseman v. State of New York, 109 A.D.2d 46, 489 N.Y.S.2d 957, 25 Educ. L. R. 876 (1985).
11. In some jurisdictions, it has been made a crime for school officials to deter or fail to report school crime. *See, e.g.*, Cal. Educ. Code §§ 12912(b), 12916; Cal. Penal Code, § 11161.5.
12. American Association of School Administrators, *Reporting Violence, Vandalism and Other Incidents in Schools* (1981).
13. Reeves, *We Let It Happen - We Can Change It*, Thrust at 8, 9 (Oct., 1981) (regarding a task force of the Association of California School Administrators).
14. *Id.* For this reason, some States now require that records of student crime and violence be maintained or that particular types of crime and violence be reported to law enforcement agencies. *See e.g.*, Conn. Gen. Stat. § 10-233g.

become an accepted part of a school's environment.

By recognizing an inalienable right to safe schools, the voters of California have specifically imposed a mandatory, affirmative duty on its school officials to develop and effectively implement plans to alleviate crime and violence.[15] Victims' rights litigation throughout the Nation has imposed a similar obligation as well.[16] As courts enhance the prerogatives of schools in dealing with school crime and violence, this duty becomes even more pronounced.[17]

The responsibility thus rests with the school community[18] to respond to school crime and violence by making schools safe, secure, peaceful and welcoming. To deal with school crime and violence, schools must proactively recognize these problems and energetically assume the responsibility to do something about them.

Student Responsibility

Although it is incumbent upon schools to protect students and others against crime and violence, victims have a responsibility to exercise care on their part to prevent victimization to the extent they are able.[19]

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15. K. Sawyer, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309, 1340 (1983). *See also* Chapter Two *supra*.

16. *See* Chapters 7, 8 *supra*.

17. *See* J. Ullman, *After T.L.O.: Civil Liability for Failure to Control Substance Abuse?*, 24 Educ. L. R. 1099 (1985).

In *People v. William G.*, 40 Cal. 3d 455 (1985), the Supreme Court of California noted that:

> When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities, [to congregate in the public schools], it assumes a duty to protect them from dangers posed by anti-social activities - their own and those of other students - and to provide them with an environment in which education is possible. To fulfill that duty, teachers and school administrators must have broad supervisory and disciplinary powers.
>
> The public school setting is one in which governmental officials are directly in charge of children and their environments, including where they study, eat and play. Thus, [for purposes of searches] students' zones of privacy are considerably restricted as compared to the relation of a person to the police - whether on the street or at home. Further, the responsibility of school officials for each of their charges, the children, is heightened as compared to the responsibility of the police for the public in general. Thus, the approaches of the law, including constitutional law, must vary.

18. School safety must be a concern of both board and staff. Discussing initiatives by one group of teachers to restore campus peace, Edward Muir noted:

> The most important development for school employees is the feeling, for the most part, the board of education and the union are looking at the same school system and seeing the same set of problems. Usually they can work together to resolve these problems. E. Muir, *New York Teachers Unite for School Safety*, School Safety, National School Safety Center Newsjournal 21, 23 (Winter, 1986).

See also A. Shanker, *AFT Commission Stresses School Safety, Discipline*, School Safety, National School Safety Center Newsjournal 8 (Fall, 1985).

19. Special care may be required where younger or handicapped students are involved. *See, e.g.*, Collins v. School Bd. of Broward County, 471 So. 2d 560, 26 Educ. L. R. 533 (Fla. Dist. Ct. App. 1985).

Students are expected to help protect their own self-interests.[20] Thus, for example, one court rejected a claim against a university filed by the parents of a 17 year old student alleging injuries when the student became associated with criminals, was seduced, became a drug user and was absent from her dormitory.[21] Students attending post-secondary schools and, certainly, older, healthy students in elementary and secondary schools, "must be presumed to have sufficient maturity to conduct their own personal affairs."[22] Although younger or handicapped students may not be able to protect their own self-interests as well as older, healthy students, they should be encouraged to develop responsibility commensurate with their health and maturity.[23]

Parent Responsibility

Parents are children's first teachers. As such, the foundation for good discipline begins at home.[24] Parental discipline guides children toward acceptable behavior and teaches them to make wise and responsible decisions.[25] Further, proper discipline helps transmit parents' and society's values.[26] To extend discipline to school, it is important that parents support school rules and let their children know that they expect them to follow those rules.[27] Perhaps even more important is to support the school when those rules are enforced.

Community Responsibility

Immediate responsibility for making schools safe may well rest with schools and students, but the problems of school crime and violence are a community responsibility as well.[28] Conduct in school is

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20. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979).
21. Hegel v. Langsam, 273 N.E.2d 351 (Ct. Com. Pleas 1971).
22. *Id. See also* Baldwin v. Zoradi, 123 Cal. App. 3d 275, 176 Cal. Rptr. 809 (1981) (no duty to prevent students from becoming intoxicated and engaging in a speed contest which resulted in one student being injured).
23. Many programs of national acclaim have been designed to reduce crime and violence on school campuses which develop student responsibility. Examples include: "Developing Student Responsibility for Violence on the High School Campus" at Alisal High School in Salinas, California; "Southern Oregon Drug Awareness Project" at Medford, Oregon; and "Triad Education" at Elk Grove High School in Elk Drove, California. K. Sawyer, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 Pac. L. J. 1309, 1341 n. 361 (1983).
24. A. Kahn, *Discipline at School Extends to the Home*, School Safety, National School Safety Newsjournal 7 (Fall, 1985).
25. *Id.*
26. *Id.*
27. *Id.*

reflected in students' actions when they become a part of the community at large. Thus, in addition to board members, educators and students, involvement is required by government officials, legislators, judges, attorneys, law enforcers, parents and guardians, and other interested constituents. Professional and civic organizations can provide special expertise in dealing with the legal and non-legal aspects of school crime and violence as well. News organizations can be immensely helpful by investigating and reporting on school safety conditions and how they are being dealt with by school and community officials.

Checklist for Providing Safe Schools

What steps must be taken to provide safe, secure, peaceful and welcoming schools? The answers are complex and varied.[29] To help schools to start reviewing their present efforts and plan future efforts, this checklist for providing safe schools is offered.[30]

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28. According to California Governor George Deukmejian, in some communities: "Up to 65 percent of all daylight burglaries are committed by juveniles who are truant on the day the offense occurred." G. Deukmejian, *School Safety: An Inalienable Right*, School Safety, National School Safety Newjournal 4 (Fall, 1985). Thus, the community at large directly and immediately feels the sting of ineffectively managed schools with high truancy or dropout problems. Clearly, a community response is required.

29. No effort is being made to set forth the answers for every school. What is being provided are merely initial suggestions to develop and implement a safe schools policy.

30. A discussion of the causes and solutions to school crime and violence is beyond the scope of this book. Selected resources include:

J. Grant and F. Capell, *Reducing School Crime: A Report on the School Team Approach* (Social Action Research Center, 1983).

Los Angeles Unified School District, *Causes of and Possible Solutions to Campus Violence: A Report to the Los Angeles City Board of Education* (1979).

National Alliance for Safe Schools, *Manual on School Crime and Student Misbehavior: Analysis for Effective Action* (1984).

National School Boards Association, *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention* (1984) (including an extensive resource and reference guide).

National School Safety Center, *School Safety Legal Anthology* (Pepperdine University Press, 1985).

Resource Manual for Reducing Conflict and Violence in California Schools (California School Boards Association, 1974).

R. Rubel (ed.), *Crime and Disruption in Schools: A Selected Bibliography* (National Institute of Law Enforcement and Criminal Justice, 1979).

R. Rubel (ed.), *Juvenile Delinquency Prevention: Emerging Perspectives of the 1980's* (Institute of Criminal Justice Studies, Southwest Texas State University, 1980).

Vandalism and Violence: Innovative Strategies Reduce Costs to Schools (National School Public Relations Association, 1971).

S. Vestermark and P. Blauvelt, *Controlling Crime in the School* (Parker Publishing Co., Inc., 1978).

J. Weis and J. Hawkins, *The Social Development Model: An Integrated Approach to Delinquency Prevention* (Office of Juvenile Justice and Delinquency Prevention, 1980).

The National School Safety Center, Sacramento, California, regularly publishes *School Safety*, available free of charge, which contains articles regarding many issues associated with school safety, discipline and campus environment. The Center also has or can direct interested persons to other resource information and materials.

- ☐ Recognize the duty to provide safe schools.
  - * School responsibility.[31]
  - * Student responsibility.
  - * Parent responsibility.
  - * Community responsibility.
- ☐ Assign specific responsibility for developing, implementing and enforcing efforts to provide safe schools to an action team or other authority.[32]
- ☐ Have an attorney knowledgable in education law matters participate in the school's efforts to eliminate crime and violence.
- ☐ Determine the nature and scope of local school crime and violence.
  - * Establish an incident reporting and tracking system.[33]
  - * Identify categories of offenses and campus trouble spots warranting special attention.
- ☐ Identify and implement measures which can be taken to prevent crime and violence.
  - * Create a plan for conflict resolution.
  - * Limit access and opportunity for crime and violence.
  - * Close campuses.
  - * Improve surveillance.
  - * Have an effective, energetic staff which provides outstand-

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31. By school, there is included the board, administrators, teachers, staff and related groups.
32. *See* J. Grant and F. Capell, *Reducing School Crime: A Report on the School Team Approach* (U.S. Government Printing Office, 1983).
33. Among the specific recommendations included in the *Final Report of the President's Task Force on Victims of Crime* was that:

> School authorities should develop and require compliance with guidelines for prompt reporting of violent crimes committed in schools, crimes committed against school personnel, and the possession of weapons or narcotics.
>
> The Report went on to explain:
>
> School authorities must be able to respond flexibly to violations of school regulations. However, robbery, violent assaults, and the possession of dangerous drugs or weapons are more than mere transgressions of decorum. School boards should set forth guidelines that make clear to administrators, teachers, students, and parents exactly which kinds of misconduct will be handled within the school and which will be reported to the police.
>
> School boards should also require that each school keep records of the frequency of criminal offenses. Without such records, boards have fewer ways of evaluating their administrators and cannot effectively design and direct crime prevention policies. All too frequently, authorities become aware of danger in the schools only after an outburst of violence or after the problem has become so serious and pervasive that it simply cannot be hidden any longer.

Final Report of the President's Task Force on Victims of Crime 101-02 (U.S. Government Printing Office, 1982).

See, e.g., Cal. Penal Code § 628 *et seq.*

ing classroom instruction.[34]

* Develop alternative education programs.[35]
* Teach "character education" type skills.
* Encourage a better understanding of the law and legal system.[36]
* Utilize special education programs for students with behavioral disorders.
* Build or remodel schools which are security sensitive (*e.g.*, improve lighting).
* Develop security systems, plans and procedures.[37]
* Require staff to challenge and assist outsiders.
* Make staff visible on campus.
* Check arrest records of employees and, if facts warrant, students.[38]

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34. *See* N. Quinones, *Creating the Climte for Safe, Effective Schools*, School Safety, National School Safety Center Newsjournal 4 (Winter, 1985).

35. According to testimony presented at a hearing before a United States Senate subcommittee:

> Whatever we now have as a problem of discipline can be expected to increase .... One single thing stands out as its existing cause, and this will only be exascerbated by heightened [educational] standards. In varying degrees and with varying consequences school problems of violence and discipline are primarily caused by students who do not want to participate in the educational process schools offer. This is not to say that intruders, the quality of school leadership, the mix of students in any given school, the inhibitions created by recent court rulings expanding student rights, the inadequacy of family support and a whole host of related factors are not important. They are. And each must be dealt with if comprehensive solutions are to be found. But addressing any one of these will amount to little more than a short term band-aid unless all are dealt with and unless all are approachable in terms of the fundamental issue of the turned-off kid.
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> Testimony of Albert Shanker, President, American Federation of Teachers, AFL-CIO, before the United States Senate Subcommittee on Juvenile Justice, at hearings held January 25, 1984, at 1.

36. *See* C. Anderson, *Law-related Education Deters Delinquency*, School Safety, National School Safety Center Newsjournal 17 (Winter, 1986); T. Evans, *Mentor Program Takes Lawyers Back to School*, School Safety, National School Safety Center Newsjournal 6 (Winter, 1986).

37. Designing and implementing security systems on school campuses is being recognized as a separate profession. *See* Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 335 n. 5, 11 Educ. L. R. 595 (1983).

School attorneys are often reluctant to encourage development of a security plan. The concern which they have is that the plan will somehow be used against the school when the plan is not implemented. *See, e.g.*, Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331, 11 Educ. L. R. 595 (1983) (duty of protection of dormitory student who was raped based, in part, on security measures adopted). *Cf.* Vitale v. City of New York, 60 N.Y.2d 861, 458 N.E.2d 817, 470 N.Y.S.2d 358, 15 Educ. L. R. 515 (1983) (court rejects argument that special duty was owed teacher by virtue of fact that teachers were to implement security plan which had not been enforced). In view of the trend in victims' rights litigation, it is more likely that liability will be imposed by failing to take preventive measures.

38. Among the specific recommendations included in the *Final Report of the President's Task Force on Victims of Crime* was that:

> School authorities should check the arrest and conviction records for sexual assault, child molestation, or pornography offenses of anyone applying for work in a school, including

* Teach students how not to become victims.[39]
* Other.[40]

☐ Establish procedures for school administrators, teachers, and staff to recognize, anticipate, respond to, and report incidents or potential incidents of crime and violence.[41]

☐ Review or develop student discipline policies and procedures.[42]
* Prescribe conduct standards.
* Prescribe general sanctions.
* Prescribe procedures for handling disciplinary matters.
* Give special attention to disciplinary procedures involving handicapped students.
* Publicize policies and procedures extensively.

☐ Establish regular in-service training programs for all staff regarding school crime and violence in cooperation with other appropriate agencies.
* Social and other problems contributing to school crime and violence.[43]
* Strategies for dealing with school crime and violence.
* Dynamics of behavior and personal interactions.[44]
* Implementation of disciplinary policies and procedures.
* Legal issues.
* Victims' rights.[45]

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anyone doing contract work involving regular proximity to students, and make submission to such a check a precondition for employment.

Final Report of the President's Task Force on Victims of Crime 102 (U.S. Government Printing Office, 1982).

39. Among the specific recommendations included in the *Final Report of the President's Task Force on Victims of Crime* was that:

School authorities should be mindful of their responsibility to make students aware of how they can avoid being victimized by crime.

Final Report of the President's Task Force on Victims of Crime 104 (U.S. Government Printing Office, 1982).

40. The above are merely a few examples. For a more detailed listing of suggestions, *see* National Institute of Justice, *Reducing School Crime and Student Misbehavior: A Problem-Solving Strategy* (1985).

41. *See, e.g.*, S. Vestermark and P. Blauvelt, *Controlling Crime in the School* 125-27 (Parker Publishing Co., Inc., 1978).

42. *See generally* J. Rapp, *Education Law* Chapter 9 (Matthew Bender & Company, Incorporated).

43. *See, e.g.*, A. Schauss, *Research Links Nutrition to Behavior Disorders*, School Safety, National School Safety Center Newsjournal 20 (Winter, 1985); J. Ryder, *Truancy and Drugs - Exploring Possible Links*, School Safety, National School Safety Center Newjournal 30 (Winter, 1985).

44. *See* P. Commanday, *"Peacemaking" Confrontation Management*, School Safety, National School Safety Center Newsjournal 7 (Winter, 1985).

45. Among the specific recommendations included in the *Final Report of the President's Task Force on Victims of Crime* was that:

* Interagency cooperation.
* Other.

☐ Evaluate administrators, teachers and staff on their willingness and ability to anticipate and deal with school crime and violence and related discipline policies and procedures.

☐ Establish procedures whereby students, parents and the community may express comments, suggestions or concerns - specific or general - regarding school safety and respond adequately to them.

☐ Develop interactive relationships with local law enforcement and prosecution officials or agencies.

☐ Develop relationships with the courts, probation and social service to better deal with problems, especially school crime and violence, drug traffic and use or truancy and school dropout.[46]

☐ Work with legislators to improve laws relevant to school safety issues.[47]

☐ Regularly evaluate programs established.

Prevention as Goal

Schools are increasingly vulnerable to suits brought by victims of crime and violence. By becoming better aware of their liability, schools have the opportunity to take proper precautionary steps to avoid that liability. This will, in turn, prevent a certain amount of victimization. The ultimate goal should not be to compensate maimed or deceased victims, or their survivors, but to prevent students, teachers and others from becoming victims at all. What is required is that our schools be safe, secure, peaceful and welcoming.

Educators should develop and provide courses on the problems, needs, and legal interests of victims of crime.

Final Report of the President's Task Force on Victims of Crime 103 (U.S. Government Printing Office, 1982).

46. *See, e.g.*, B. Swans, Jr., *Ganghusters! Crisis Intervention Network*, School Safety, National School Safety Center Newsjournal 12 (Winter, 1985); J. Yeaman, *Courtrooms - Classrooms*, School Safety, National School Safety Center Newsjournal 8 (Winter, 1986).

47. *See, e.g.*, United States v. Nieves, 608 F. Supp. 1147 (S.D.N.Y. 1985) (upholding 21 U.S.C. § 845a creating irrebuttable presumption that the sale of narcotics within 1,000 feet of a school endangers students and thus allowing stiffer penalties upon conviction); Cal. Educ. Code § 48904 (schools may offer rewards to apprehend school crime and violence perpetrators; parents may be responsible to pay reward under some circumstances).

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